BUSINESS LAW

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BUSINESS LAW

An Elementary Treatise

BY

ALFRED W. BAYS

PROFESSOR OF COMMERCIAL LAW, NORTHWESTERN UNIVERSITY SCHOOL OF COMMERCE; AUTHOR OF "CASE BOOK OF COMMERCIAL LAW" AND "AMERICAN COMMERCIAL LAW SERIES"

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PREFACE

THESE pages are intended for use by students in schools and for readers in general who desire a brief exposition of the underlying principles of the law governing business transactions. The author has deemed it essential to make the statement as plain as possible and to resist the temptation to elaborate. Physical limitations themselves in a book of this character require brevity. But the chief consideration is that the students for whom this book is intended cannot be expected to derive more than a general, and in some cases, unfortunately, a transient knowledge unless in later life in or out of school they pursue the study further. The author is convinced that many books of this type are spoiled by wrongly directed ambition. What is said here should be of a basic or introductory nature. Accordingly, the first several chapters aim to present a general discussion culminating in a statement of the purpose of the study of "business law." For the same reason more space has been given to the fundamental subject of contracts than to any other.

After much consideration, it has been decided not to include forms. Several reasons have induced to this conclusion. The chief purpose of putting forms in a book of this character is to acquaint the student with their appearance and phraseology. But when it is remembered that the students may purchase from any

stationer blank forms prepared for the needs of the particular jurisdiction, it seems that that fact furnishes the suggestion. It is therefore recommended that the student procure in connection with this book several blank forms for use at the appropriate place. The following are suggested: a bill of sale; a stock certificate; a warranty deed; a lease; a trust deed or mortgage. Bills of exchange, promissory notes, and checks are illustrated in the text.

Questions and problems follow each chapter, but the teacher will find it profitable to frame many others from the text in addition to those given.

ALFRED W. BAYS.

NORTHWESTERN UNIVERSITY, EVANSTON,
AUGUST, 1919

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BUSINESS LAW

PART I

INTRODUCTORY

CHAPTER I

LAW DEFINED

THE NATURE OF LAW

The units of political power. The people of the world, as we know, have no common government. They are arranged, for governmental purposes, in groups of various sizes and degrees of strength, which, by our hypothesis, have political independence. In the progress of our civilization, some of them may break up into further units, some of them may coalesce and merge, but so long as it is true that there is no common government over all people, organized society necessarily consists in a collection of independent groups.

These units of political power are known as nations, governments, states or sovereignties. The two last words seem technically preferable, for the word nation is frequently used to denote a people of ethnic unity, though perhaps not of political independence as such unity; and the word government may properly be employed to designate the government of a dependency

or subdivision of sovereignty. And yet usage justifies either 'nation' or 'government' as words to describe independent political powers; and no harm is done if we remember that the words may be used in the other sense just described. But by 'state' or 'sovereignty' we always in political science mean a political power without a superior, a body politic owing no allegiance. In this sense, the United States is a state or sovereignty and the so-called 'states' of the union are subsidiary governments which must deal with other sovereignties through the sovereign United States.

Sovereignties or states exist and maintain order by law. It is apparent that a group of people, who desire (or whose leaders desire for them) to form a social organization of stability which can have not only strength to survive against external attack, but also internal peace and order, will find it immediately necessary to establish authority and to issue rules which all within the group must obey, calculated to produce harmony of action, cohesion of members, internal peace and the strength of union. That by which such authority is established and maintained is known as *national law*, or, more usually, *municipal law*. What strictures may be imposed by the people of an independent group upon their representatives or upon the power of the central authority, does not detract from its character as a sovereignty as that term is used to denote international independence. Thus our own federal government cannot enact laws on certain subjects, but that is because the people of the United States have willed it so. The sovereignty of the United States among the nations of the world is not thereby affected. As a political

power it stands upon a strong foundation of popular support, and is enabled to assert its sovereignty against any attack.

It is also apparent that sovereignties in their communications with each other, in their common needs and in their mutual recognition of things right and just, would feel the need of establishing common rules, of making agreements and upholding common customs. Such internationally recognized rules, customs and agreements are known as *international law* or *the law of nations*. Thus, national or municipal law and international law, being commandments emanating from sovereignty, constitute what we know as political law, and are its two great branches.

The character of international law. It has been seen that international law is that law commonly accepted among sovereignties for the regulation of international affairs. It will appear that such law exists merely by common consent among nations and that there is no power superior to them by which it can be prescribed or by which it can be enforced. In this respect it differs basically from the law of a sovereignty. It is for this reason that sovereignties may differ upon questions of international law, and a nation may feel bold to disregard it. Nevertheless, in its main conclusions, it is fairly well established, it progresses with civilization and is generally obeyed. Its infraction leads to protest, demand for indemnity and war.

International law is said to be *express* when it is put in the form of treaties and in the form of agreements and codes adopted in convention. It is said to be *tacit* when agreed upon by common observation of customs.

The character of municipal law. It is municipal law with which the individual is generally concerned, and which we shall consider in this book. Municipal law is the law by which a sovereignty organizes itself, regulates its affairs, establishes harmony of action and maintains peace and good order. There is a power to prescribe it and a power to enforce it. In less civilized states, such power is often arbitrarily expressed and unevenly applied; but with more enlightenment come laws of permanence, uniformity and justice.

THE DEVELOPMENT OF LAW

Law must not be looked upon as a perfect system of rules given to us by a higher power. It is always in development. It deserves respect and demands obedience as the expression of that which is necessary for order and security. In a crude society, the law is crude, often brutal; in a higher order, it expresses the degree of the civilization. It is often a compromise, not only between good and evil, but between opposing views equally sincere. The layman sometimes thinks of the law as merely that which forbids wrongdoing; but a great part of our law is nothing more than rules of action in business life, usually suggested by experience, by which to guide and interpret the manifestations of the business world.

Questions and Problems

(1) Define, as used in international law, the word 'sovereignty.' What is the other word which contains the same idea? Is the State of New York a sovereignty within this definition? Is the Dominion of Canada? Name some sovereignties.

(2) What is international law? How does it develop? How is it enforced? What two kinds of international law? Define each.

(3) What is municipal law? Why is it always in process of development?

CHAPTER II

THE BRANCHES OF MUNICIPAL LAW

LAW CLASSIFIED ACCORDING TO ITS OBJECTS

In general. The object of municipal law is to create a compact state to serve the ends of political power as conceived by the people or their leaders or representatives. Our Declaration of Independence contains a statement of the ends of government according to the ideas of our forefathers. "To secure these rights, governments are created among men deriving their just powers from the consent of the governed." But how shall this be accomplished? It is necessary to establish the form of government, to set forth its powers, to define the rights of individuals as between themselves, and as toward the state. A multitude of laws must be put in force, changed, repealed and added to from time to time as new needs arise. These laws fit into the great structure of law to serve its grand aim. But in themselves they must accomplish more immediate ends. Let us inquire as to those more immediate purposes; in other words, classify law according to its various objects. A classification on this basis is the true classification to denote the character of law.

The classification, as made here, is not a perfect division of law into separate branches; nor can it be.

Particular laws seek various objects; the branches intertwine. Thus the law of Property may involve Constitutional Law, Criminal Law, the Law of Torts, of Contracts and all the other branches.

Constitutional law. This is the law whose object is to establish the government and assert fundamental political rights. In the United States we have a written constitution which is our basic law, and all enactments must be in accord therewith. It is described in the next chapter. But many countries do not have written constitutions.

Administrative law. The law by which the government operates, such as revenue laws, laws establishing courts of justice, laws creating political divisions.

Criminal law. This is the law having for its object the maintenance of the peace and good order of the state; the law by which certain acts or omissions to act are declared to be of such serious damage to the state in its collective capacity that the state will, in its own name, institute legal proceedings and inflict punishment.

The breach of the criminal law is called a crime. A crime may be defined as an act, or an omission to act, of such serious tendencies to the damage of the state in its collective capacity that the state will, in its own name, and for its own sake, take notice of the event and punish the actor for the purpose of warning him and others against like conduct in the future. It is the injury *to the state* which makes the conduct a crime. If an individual is also injured he may have redress for his injuries under the law of *torts;* but it is the injury to the state, the *public wrong*, which makes the act a crime. Many injuries which are hurtful to individuals

and which therefore constitute grounds for suits for damages are not criminal in character, because the injury is not of such a nature that it tends directly and materially to disturb the peace and good order of society and may therefore be safely left for correction to the suit of the individual for his damages. Such, for instance, is injury by mere negligence, as where I lend my book to a friend and he carelessly loses it. Here there is no crime; but if he steals my book, a crime is committed; the state may punish and I may have my suit for damages. In this case he commits a *crime*, or wrong to the state, tending to disrupt its peace and the public security; and he also commits a *tort*, or private wrong to an individual. Many crimes arise out of acts which are not wrongs to any particular individuals, as in cases of exceeding speed limits upon highways, having counterfeit models in one's possession, and the like; but usually a crime does involve also a wrong to an individual.

Examples of crimes are: murder, arson, burglary, robbery, larceny, assault and battery, getting money under false pretenses and disturbing the peace.

The law of torts. The law imposes upon each individual duties toward other individuals as individuals. Membership in society brings curtailment of natural liberty. If one person infringes upon the rights of another as defined by the general law, the injury is called a *tort*. The act may, as we have seen, be also a crime; and it may not be. Whether it is or not is immaterial in the definition of the tort. A tort may be defined as a wrong committed by one individual toward another, consisting in the violation of the general law

by which the rights of individuals *as such* are established. In a tort we must have injury to an individual. No matter, for instance, how careless a person is, if no one is injured by that carelessness, no tort has been committed, for no one has any right to complain that he is damaged.

Various torts are: negligence, slander and libel, trespass to property, assault and battery, improper acts of dominion over another's goods (conversion), fraud and conspiracy.

The law of contracts. This is the law under which obligations may be assumed by agreement. It is considered fully hereafter.

The law of property. This is that branch of the law which regulates the ownership of private property. It determines the theory of ownership, covers one's duties respecting the use of his property, defines the manner of sale or gift, establishes the rules of descent upon the death of the owner.

The law of persons concerns the status of persons of exceptional classes, as those under age and insane persons.

The law of delegation and representation. This is the law under which one (called a principal or master) may delegate to another (called an agent or servant) the power to act in his name and for him. It constitutes one of our subjects of extended discussion hereafter.

The law of business associations. Corporations and partnerships are the most important headings here. These are considered fully in later chapters.

The law of pleading and procedure. This is the law by which a right arising under some other heading of

law is enforced in and carried through the courts. It is sometimes called *adjective* law; and the law for whose enforcement it is provided is called *substantive* law.

Other headings might be mentioned, but the most important general branches are above enumerated.

LAW CLASSIFIED ACCORDING TO SUBJECT MATTER INVOLVED

The law is often treated in textbooks and digests under headings of a narrower and more specific nature than those we have considered, as, the law of negotiable paper, the law of carriers, the law of bankruptcy, etc. These are either further subdivisions of the subjects above enumerated or subjects upon which to attain its more general ends the law operates. In our discussion at length hereafter we shall have occasion to consider some of these specific subjects.

Questions and Problems

(4) What is the most satisfactory classification of law? Why?

(5) What is constitutional law?

(6) What is the object of administrative law?

(7) What is the object of the criminal law?

(8) Define a crime.

(9) Is a crime necessarily injurious to an individual?

(10) What is an act called which results in injury to an individual when considered from that individual's standpoint? Is such act also a crime?

(11) Name some crimes.

(12) Name some torts.

(13) What is comprehended in: the law of persons, the law of delegation and representation, the law of business associations?

(14) What is adjective law? Its object?

(15) In what other way is the law often divided?

CHAPTER III

THE AMERICAN SYSTEM OF GOVERNMENT

HAVING defined law and noted its various branches, we are in a position to take up the subject of Form and Expression of law. But it seems advisable as an introduction to that subject, to consider briefly the form or system of American government. This chapter is devoted to that subject. Only the barest outline will be attempted, as the subject is more properly one to be developed in a text on civil government or history.

HISTORICAL

The American colonies at the time of the Revolution. When the war was in progress, the American colonies were strung along the Atlantic Coast, united in bitter experience and in tradition and language, but several in political independence. Events were rapidly disclosing the weakness of their condition. But the people were suspicious of a centralized power and tenacious of local rule. They had just emerged from the control of tyrannical government and were apprehensive of the tendencies of a centralized power. Nevertheless, it was apparent that some sort of coöperation and common defense must be devised.

The Articles of Confederation. To meet the need thus felt, the colonies sent delegates to Philadelphia,

who on July 9, 1778, adopted "Articles of Confederation and Perpetual Union," reciting that each state retained its "sovereignty, freedom and independence," but that the states entered into a "firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare," setting forth the right of the people of any state to travel into and out of any other and to enjoy the commercial privileges of the citizens of any state into which they might come or send their commerce; creating a general Congress whose powers and limitations were set forth at length.

Weakness of the confederacy. The confederacy failed because there was no centralization of power, no way by which any common need could be met with executive force. It was soon evident that a stronger alliance or indeed a merger into one government out of the many would have to be devised. It was urged that one sovereignty should replace the thirteen. Indeed, acts of sovereignty by the congress were already beginning.

The adoption of the federal Constitution. To attempt to devise some better method of association than had been accomplished under the confederacy, the states sent delegates to convention, who after much consideration, debate and compromise adopted on September 17, 1787, the federal Constitution, which was ratified to take effect on March 4, 1789, the general nature of which we will discuss in another connection.

THE DUAL SYSTEM OF AMERICAN GOVERNMENT

The federal government. — Its nature. Under the federal Constitution, the United States government is

made a sovereign power, with full centralization and grant of power necessary to that end. That government was created by the then sovereign states by the adoption of the Constitution setting forth its powers. Whatever power the United States has must therefore be derived from that Constitution. The brief history which has been recited above is for the purpose of showing how our federal government is one of *delegated power*, the reserve of power being in the various states, who, having all power, met to grant away a portion of it. That delegated power under the Constitution is either *express*, that is, set forth in terms in the Constitution, or *implied*, that is, inferred as necessary, reasonable or convenient to carry into effect the express power. But therein, either from direct statement or by inference, must be found all federal power.

The enumerated powers of the federal government. The specific powers of Congress are set forth in Article I, Section 8, of the Constitution, which is published as an Appendix to this book. The reader is referred to that portion of the Constitution to be read at this point; and it would be well to read the entire document in connection with this chapter.

The implied powers of the federal government. No better illustration of the inferred or implied powers of Congress can be found than the one contained in the early case of McCullough *v.* Maryland, decided in the United States Supreme Court. The question was whether the United States government could incorporate a national bank. The Constitution does not expressly give the government the power to establish a bank or to incorporate a company. The fiscal powers of the

government are, however, very full and extensive, with the right " to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Chief Justice Marshall decided that under the express fiscal powers and the right to pass all laws necessary and proper for carrying them into force, legislation establishing and incorporating a national bank was constitutional. From that time on, there has very fortunately been what may be termed " liberal construction " of the Constitution, as opposed to the construction demanded by the " strict constructionists."

The powers of the states. As the United States is a government of delegated powers, and as the states, prior to that delegation of power, contained all power, it follows that the states possess all political power which they have not granted away. To find whether the federal government possesses any power, we must look to its Constitution to find it therein expressly or impliedly given. But to find whether the states have any power we look to see whether it has been taken away. Sovereignty has been taken away and so has the right to secede from the Union. So have many powers enumerated in the Constitution, including certain rights to legislate upon questions of citizenship; as well as those enumerated powers in Section 8 of Article 1 (although as to some of these the states may legislate until Congress has acted). But the great reserve of power as to commercial life, ownership of property and political status, is in the states.

The state constitutions. Each state, for the establishment of its own government, has adopted a constitution. What that state constitution contains is

purely a question for the state itself, so long as it covers matter left to the state under the federal Constitution, and the state constitution may be amended at the pleasure of the state. While in force, however, all state legislation must be in conformity with the state constitution, as well as not in conflict with the federal Constitution. If a state statute is opposed to either, it is unconstitutional and void.

Questions and Problems

(16) What was the political condition of the colonies after the Revolution?

(17) What were the Articles of Confederation? When adopted? Why did the confederation fail?

(18) When did the federal Constitution take effect?

(19) What is meant by saying that the federal government is one of delegated power?

(20) What was the case of McCullough *v.* Maryland? What principle of constitutional construction did it decide?

(21) What is the office of the state constitution?

CHAPTER IV

THE SOURCES AND FORMS OF LAW

TWO FORMS OF EXPRESSION

LAW has two general forms of expression: (1) by the enactment of law-making bodies, called *written* law; and (2) by the declaration of judges in their decisions construing and applying general customs and traditions, called *unwritten* law or *common* law. Each of these two forms of law requires discussion.

ENACTED OR WRITTEN LAW

The source of enacted or written law. There is, in every government, a "law giver." The law giver may be one man as in a tyranny, or, as is now the case in every country of importance, a body of men, as a Congress or a Parliament. Law promulgated by such a law-making body is called *enacted* law or *written* law.

Why called written law. Manifestly there is but one sound and logical way by which a law-making body can pronounce and record its will and that is by reducing to writing the proposition decided upon. Because the permanent memorial of the will of the law-making body is in writing, the term "written law" is used to describe it.

The character of the operation of written law. Written or enacted law looks to the future and is in general

terms. This excludes special legislation designed to operate upon some particular fact, and refers to general law with which we are concerned. So qualified, written law sets forth a rule of action to govern future conduct.

The forms of written law. Written law is expressed in (*a*) treaties; (*b*) constitutions, and (*c*) statutes.

A *treaty* is a compact between sovereignties.

Constitutions have already been described in the previous chapters.

A *statute* is a law passed by the law-making body under the powers granted to it. In our government it must be *constitutional*, that is, in accord with the governing constitutions. Statutes are enacted by the federal government upon the subjects over which Congress has power under the Constitution. Such laws must not be opposed to the letter or intent of the federal Constitution. If so, they are called "unconstitutional" and are void and of no effect. The states enact laws upon the powers reserved to the states. Such laws are unconstitutional if contrary to either federal or state constitution.

The word *ordinance* is popularly used to indicate the law of a municipality. It is enacted under the authority of the state of which the municipality is a subdivision. This word has a larger meaning also to indicate a charter or statute, as, the "ordinance of 1787."

Codes. When the law upon any subject is drawn up in a concise and logical statutory form, rather than by additions and amendments from time to time made by succeeding legislatures in more or less fragmentary form, we call such enactment a code. A more ambitious attempt might be made to draft the bulk of the

law in the form of a code, but any subdivision so handled is properly termed a code. The two most famous codes of history are the Justinian Code and The Code Napoléon. In England, there has been much recent codification on various subjects; and in our own country, some of the states have attempted more or less codification. The matter of codification of particular branches of law has been assisted by the work of the Commissioners on Uniformity of Legislation hereafter described; although the laws proposed by them are more generally referred to as "Uniform Laws." But it is generally true that American legislation is not in form of codification but rather of statutes enacted piecemeal from time to time on narrow subjects of law.

Uniform laws. Inasmuch as the division of our government into states each with its great reservation of power to enact its own laws on commercial and local subjects results often in unfortunate changes in the state lines which are crossed and ignored by commerce, a very successful attempt has, of late years, been made to secure uniformity of legislation by the different states upon various subjects, especially those of decided commercial importance. This has been brought about by the appointment by the different states of Commissioners upon Uniformity of Legislation. These Commissioners meet annually and from time to time draft proposed laws upon certain subjects which after having been fully considered and then adopted by them, are recommended to the various states for passage. Such proposed laws do not, of course, have the effect of law until enacted by the various states. Thus a so-called uniform law might be in effect in but a few states, or

might not be adopted by any state. The most successful acts, having been widely adopted, are The Negotiable Instrument Law, the Sales Act, the Bills of Lading Act and the Warehouse Receipt Act.

COMMON OR UNWRITTEN LAW

The governing force of customs and traditions. It is clear that, especially in the early life of a government, there cannot be legislation or written law to govern every need. Cases will constantly arise wherein the decision must rest upon customs and upon common traditions of right and wrong. By applying these customs and conceptions of right to the cases as they come before them, the judges make them law. Common or unwritten law is therefore frequently called "judge-made law."

Why called unwritten law. The law so made is called *common law*, or *unwritten law*, because it does not originate in a written form by enactment of the law-making body. It has been a favorite fiction among law writers and judges to speak of common law or unwritten law as law whose origin is lost in the mists of antiquity, "whereof the memory of man runneth not to the contrary," as Blackstone says in famous language. But, as a matter of fact, common or unwritten law is simply judge-declared law, whose origins we may often trace and phases of which are indeed now, and must always be, in process of formation.

Common or unwritten law always consists in general principles of justice and universally established customs. Judges always deprecate their power to make law. They insist they can only *declare* and *apply* that which is

already law, and that is, generally speaking, quite true. Our law-making bodies are exclusively the law-making powers, in so far as the right to enact a rule to govern future cases is concerned. If, for instance, we are to have an eight-hour law for women, only the legislature can enact it. But courts must necessarily apply principles of common justice and the rules of common custom to cases in which there is no written law. Being so applied such principles and rules become declared law. In early English days, there was little written law. Coming on down the centuries, we find a greater tendency to formulate law in written statement by enactment. But all our law rests upon the great foundation of unwritten law.

Where unwritten law is found. Calling common law unwritten law is likely to mislead. It is not unwritten in the sense that there is no written statement of it. As it was pronounced by the judges, it was written down by *reporters*, and the reports of decisions were eagerly read by the judges in their search for *precedents*. For precedents formed the law and there came to be a rule called *stare decisis*, "let the decision stand," meaning that what has been declared to be law in one case would be followed by the judges in other cases involving the same principle, for otherwise there would be no law, but everything would depend upon the particular judge's view. Yet it is also true that justice requires the over-rulings of many decisions where they are clearly fallacious or time creates new public opinion. Statutes may, of course, at any time change what has been the law.

Written or statute law *declares* or *supplements* or *modifies* or *abrogates* the common law.

Questions and Problems

(22) What other name is given to enacted law? Why?

(23) What three forms of enacted law are mentioned in the text?

(24) Define a constitution. What country has no written constitution? Has the United States a written constitution?

(25) Why is the United States spoken of as a government of delegated power? What word describes the nature of the states' power with reference to the national government?

(26) Enumerate some federal powers.

(27) Do all of the states have written constitutions? What purpose is served thereby?

(28) If an enactment is contrary to the Constitution, what do we say of it? Who decides this?

(29) Define an ordinance in its commonly accepted meaning.

(30) What is a code? Is the law of our country in code form?

(31) What is meant by common law? Can judges "make law"?

(32) What is the effect of a precedent? What is the rule of *stare decisis*?

(33) What is the relation of the statute law to common law?

CHAPTER V

COURTS AND COMMISSIONS

JUDICIAL COURTS

The functions of the courts. The courts are created to construe the law and apply it to the various cases as they arise. They state the common law, as we have seen, applying it to the varying circumstances as cases come before them. But they must also construe and apply the statutory law and constitutional provisions. If, therefore, we wish to know what the law is on any particular subject, we must consult the statutes to find if anything is written there upon it, and whether we find it there or not, we must go to the reports to see what the judges have declared the law to be in case there is no statute, or how they have construed and applied a statute.

Trial courts and courts of review. Courts may be classified as those of original jurisdiction in which suits are started and tried, and those of superior jurisdiction to which cases already tried in the lower court may be carried by a defeated party for purposes of review. A court of review does not try a case; it does not hear any evidence. Its function is to determine whether the trial court erred in announcing and applying the law applicable to the facts of the case. If the upper court is convinced that manifest justice has been done it will

affirm the decision of the lower court, and if not, it will reverse it, and in reversing it, may grant a new trial in the lower court. The vast majority of cases are not carried beyond the trial court, as no end is to be gained by going further unless the defeated party is not only convinced that he has not received justice, but also that the amount involved is large enough to warrant the further trouble and time.

The federal judicial system. In our dual system of government we have the state courts and the federal courts with respective jurisdictions suggested by what we have heretofore said about our system of government. Let us briefly notice the framework of the federal judiciary. The United States is divided into judicial districts, a district usually being coterminous with a state, but in some states there are two or three districts. Thus in Illinois there are the Northern and Southern districts of the state of Illinois. In each district is a district federal court which constitutes the federal court of original jurisdiction. The United States is also divided into judicial circuits, each circuit comprising a number of districts. In each circuit is a circuit court of appeals, to which appeals may be had from any district court in that circuit. The United States Supreme Court sits in Washington and is composed of nine justices. It is the highest court in the land and may review appealable cases from any part of the United States.

The reports. The decisions of the higher courts are supported by opinions written by the judges, and these opinions are contained in bound volumes called *Reports*. In early days these reports went by the name of the

reporter, but now are called by the name of the legislative jurisdiction, as "Illinois Reports" or "Federal Reports." A case in a report is cited thus: Wuller *v.* Chuse Grocery Co., 241 Ill. 398, meaning the case of Wuller against (versus) Chuse Grocery Co., reported in Volume 241 of Illinois Reports, beginning at page 398. We have already noticed that it is in these Reports that we find the declaration and the application of the common law and the application and construction of statutory and constitutional law.

ADMINISTRATIVE BOARDS AND COMMISSIONS

General statement. The description of the formation, expression and enforcement of our law is not complete without a reference to the boards and commissions which are charged with the administration of certian of our laws and which in fact have some power of a judicial nature. Tendency has been quite marked in recent years to create commissions for the administration of various laws. Practise before these bodies has some of the appearance of a trial before a regular judicial court; and they make rulings, decide questions of fact and apply the law to those facts. Their decisions, however, are subject for the most part to review by the courts, especially in cases of lack of jurisdiction and abuse of discretion. A reference to the most important of these boards or commissions will more thoroughly explain their nature.

Interstate Commerce Commission. The United States Congress has established this commission to deal with the problems resulting from the natural monopoly of railroads. It may investigate railroad manage-

ment, consider the reasonableness of established rates and make reasonable rules to carry out its powers. Its rulings and its orders are subject to review by the courts. It may call witnesses and conduct hearings.

The Federal Trade Commission. A recently created commission is that known as the Federal Trade Commission created by Congress. Its power is to inquire into unfair methods of competition of those dealing in interstate trade. It has the power to call witnesses and conduct hearings and make investigations and propose legislation. But it has no final judicial power, as those affected may appeal to the courts for review of its orders.

The Federal Reserve Board. This board is created in connection with the Federal Reserve Banking Act and for the purposes of administering that act effectively.

State public utilities commissions. In some of the states, commissions have been given the power to investigate the conduct of railroads, street railways, telephones, telegraphs and other public utilities with the object of bringing about better service. Their acts are subject to review by the courts.

Industrial boards. Boards have been established in many states for the purpose of correcting evils of factory and other industrial conditions, awarding compensation to injured employees, etc.

Questions and Problems

(34) What is the use of a court?

(35) Why is it necessary to see what the court has decided to thoroughly understand statutory law?

(36) What two classes of courts are there with respect to the trial and review of cases?

(37) Name the kinds and purposes of the various federal courts.

(38) What are the judicial reports?

(39) How are reported cases referred to?

(40) What are the uses of administrative boards or commissions? Are their rulings subject to review? Name some of them.

CHAPTER VI

COMMERCIAL LAW AND ITS STUDY

What is commercial law. Having now studied the general nature and the sources of law, let us inquire, before going further, what we mean by the words "commercial law" or "business law." Manifestly all law does more or less closely affect business. But we may choose various topics of the law with which men in business are directly concerned — the laws which govern their activities from day to day — and call the collection business or commercial law. All writers upon the subject would not agree upon all of the subject matter to be covered in a book of this sort; but upon some topics all would agree, and it is doubtful if any of the subjects covered in this elementary treatise could be omitted from any book on business law; except that the subject of Property, included herein, is sometimes omitted.

Our most important, our basic subject, is that of The General Principles of Contract Law. To a thorough knowledge of this subject will be credited a better comprehension of the subjects which come after, some of which are in fact but narrower branches of the law of contract.

What may be gained by a study of business law. Erroneous conceptions of the value of a study of business law are frequently met with among law students.

It is very important to have a proper understanding of the results which we may expect to gain. The law is a subject to which the wisest man may devote a lifetime of study without exhausting its possibilities, not only because of its constant development, but also because of the many branches and limitless applications of the subject. What then may we do in a short course or the reading of a small book? We can only scratch the surface; or, to adopt a better metaphor, we can only get a bird's-eye view of the great territory and note the general direction of some of its main highways. In what ways will that be helpful? Let us see if we cannot at least partially answer that question.

A study of business law helpful in practical ways. Anyone who would study business law in the way it must be presented in a short course, or in fact in any way short of making a professional lawyer of himself, and expect thereby to be able to dispense with legal advice and assistance would truly justify the old adage that 'he who is his own lawyer has a fool for a client.' Nevertheless there are many highly practical advantages to be gained which one may make use of in his daily work. There are many fundamental principles that are so well imbedded that one may learn them and act upon them with assurance that they will not change. For example, any business man, on being presented with a promissory note, ought to be able to say at once (1) whether it is negotiable and (2) why it is of importance to know whether it is negotiable or not. So every business man ought to know that a promise not based upon consideration is unenforceable, and he ought to be able to tell whether consideration is present or

absent in any particular case. Scores of other examples might be given. Again the study of the law helps one in a practical manner because it broadens one's legal vision. It teaches one to know a legal problem when in his own life it presents itself. It puts him on guard when to seek legal advice and it makes him a more intelligent client. It need not be feared that a student of business law will suffer harm because he will try to act as his own lawyer. The subject properly presented should show him his own limitations rather than set him up in his own conceit.

The law a cultural study. It has always been recognized that a study of law is cultural in the highest sense. It is a study of human nature in its many manifestations. The law is a study of the problems arising out of commerce among men, and their solution of them. Not until we have a problem or need do we have law. For instance, not until we have one person buying an article and being dissatisfied with it and bringing suit about it, do we have a judge declaring that a person who sells personal property under some conditions warrants its quality. In the cases which we study which declare or develop the law we see the contest of desires, and of different viewpoints. Out of the clash, law develops. It is for reasons such as these that a study of law broadens our outlook and is educational in a higher sense than that of being merely informational.

It has likewise been generally recognized that a study of law trains one in the processes of logical thought. The law is based upon logic and human experience. It is not pure logic, for much law is that which has been suggested by human experience, which seems not always

strictly in accord with reason. Yet in this we have reason applied to human needs to produce a workable rule to guide conduct.

Questions and Problems

(41) What is meant by the phrase "commercial law"?

(42) Can one by a study of commercial law learn enough law to be "his own lawyer"? Explain.

(43) In what ways is a study of commercial law helpful?

PART II

THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT

CHAPTER VII

WHAT IS A CONTRACT

Legal obligations assumed by agreement. A large percentage of obligations existing in the business world are voluntarily assumed by *agreement*. We have seen that there are innumerable obligations imposed upon one by the general law, from whose operation he cannot escape. Far more important commercially and for the progress of society as a whole are those engagements into which men voluntarily enter to assume obligations toward particular parties with whom they have chosen to deal. That such engagements may be relied upon, the obligations which by their form they contemplate must be made enforceable by the law. Otherwise all commerce between men except that of the crudest barter would be left to the whim, fancy or good will of the individual. It is true that usually men do perform their business engagements without legal compulsion because they are honest and fair and because it is not good business practice to violate engagements. But a person with whom an engagement has been made cannot rely alone upon this probability and these motives. He must

have the *law* behind the promise, so that he can safely plan his future conduct with the knowledge that he can *enforce* the agreement if need be. It is the law behind the world of credit which enables it to be the mighty thing it is in our modern life.

Contract defined. A contract may be defined as an agreement between two or more persons for the breach of which damages may be recovered in a court of law.

Two main ideas in contract. In our definition of contract we notice that we have the idea of *agreement*, resulting in *legal obligation*. An agreement may not contemplate an obligation; or if it does, it may not be a legal obligation. An agreement may be merely passive, as that Washington was our greatest president; or may contemplate an obligation of a purely social sort, as an agreement to take a pleasure journey. In neither case is there a contract. To be contractual, the obligation contemplated must be one which is regarded by men generally as having legal consequences — restricting one's future course of conduct; by which he must part with some property, do some act or refrain from doing some act.

The elements in contract. To be contractual, an act must contain the following basic elements: (1) parties competent to contract; (2) offer and acceptance; (3) consideration (or in a type of contract not so important in business law and in some respects becoming obsolete, a seal); (4) legality in its object and in the manner in which it is made.

Kinds of contracts. Contracts are:

bilateral (consisting in promise for promise);

unilateral (consisting in promise for act);
executory (when bilateral);
executory on one side (when unilateral);
formal (when under seal);
simple or by parol (when not under seal, whether oral, in writing or implied);
express (when verbal, whether oral or in writing);
written (when in writing);
oral (when merely spoken, sometimes mistakenly called verbal);
implied (when inferred from conduct).

Questions and Problems

(44) Why is it important to have a law of contracts?
(45) Define a contract.
(46) What two ideas are in contract?
(47) Explain how an agreement may not be contractual.
(48) What are the elements in contract?
(49) A, the owner of a newspaper, offers a prize to the person who will obtain the largest number of subscriptions in a certain period. B obtains this number. Is this contract bilateral or unilateral?
(50) A contracts with B that A will, for a certain price, sell B a horse at the end of the harvest season. Is this a bilateral contract? Is it executed or executory? Is it formal or simple? Is it express or implied?
(51) A calls B and requests B to dig a ditch for him, saying nothing about pay. B promises to dig the ditch in accordance with A's directions and does so. After doing the work, B demands pay. What term describes the nature of A's promise to pay B?

CHAPTER VIII

THE FORMATION OF CONTRACT: (1) PARTIES

COMPETENT PARTIES ESSENTIAL

Party defined. One who makes a contract is called a "party" thereto. At least two parties must exist in every contract. There may be more. Usually there are not more than two sides, although there are frequently several parties on one side.

If one is not a maker of a contract, no matter how strongly benefited or affected by it, he is not a party to it, and, generally speaking, has neither rights nor obligations upon it.

Who may be a party to contract. All normal persons of legal age are capable of making contracts. Those under age have a limited capacity. Those who have limited mental capacity are under contractual disability. Married women, by early law, were not capable of contract, though that disability has been removed. The capacity of a corporation is governed by its charter.

MINORS AS PARTIES TO CONTRACTS

Minors, or infants, defined. A minor or infant, in the law, is anyone who has not attained the age set by the law as that age to which one must come before he attains the fullness of his legal powers. At common law, this age was twenty-one for males and eighteen

for females. These are also the usual ages prescribed by statute. The law in establishing such an age recognizes the fact that in the life of every individual we may roughly draw a line between a period of youth and a period of manhood and womanhood. In actual life we cannot draw this line sharply, but it is necessary for the law to have some definite rule to go by and this is accomplished by drawing the line somewhat arbitrarily through a certain day in the life of every person. Some persons are more mature at eighteen than others at twenty-five, but obviously, we cannot take this into consideration as it would open up endless and unsatisfactory discussion in each individual case.

The main purpose for drawing this line between infancy and adult life is to save the minor from the consequences of his own folly and his improvident contract, but here again the law has deemed it best, for the accomplishment of its purposes, not to inquire into each individual bargain to ascertain whether it is to the advantage or disadvantage of the minor, but to lay down general rules upon which the court may proceed. We may state those general rules as follows:

Power of minor to contract. A minor has the power to make a contract but it is voidable by him unless it is for necessaries as shown below.

> **Example 1.** A, a minor, agrees with B, an adult, to work for B a specified period at a specified sum. This is a good contract and, although A may at any time withdraw from it, B is bound until and unless A does withdraw.

Must return benefits when avoiding. Any contract made by a minor (except his implied contracts to pay

for necessaries actually received) may be avoided by him, upon his returning unearned benefits received under the contract. If he affirmatively seeks the rescission, as a plaintiff, he must give back the benefits if he still has them, and some authorities hold that he may rescind even if he cannot place the other party in statu quo. This would seem to be a wise rule if the contract was unfair, or he was substantially impoverished by the contract, but otherwise it would seem grossly inequitable. If the infant is sued, he may always defend that he was a minor, giving back the benefits if he has them, but otherwise having his defense.

> **Example 2.** A, a minor, being away from home to attend college, gives dinners in his rooms to friends at night time, running up an account with B for fruits and candies. B sues him. A pleads his minority as a defense. It is a good defense and B loses the case, notwithstanding the benefits cannot be returned. If he could return them, he would be obliged to do so. If in this case the minor had sued to get back his money the better rule is he could not prevail because he could not return the benefits.

Right to avoid lost by ratification. A contract which a minor may avoid becomes binding upon him if he ratifies it after he becomes of age. Ratification cannot take place under age. Ratification consists in expressly confirming after majority, a contract made during minority, or in continuing to enjoy its benefits.

> **Example 3.** A buys an automobile while he is a minor. After his majority he uses it for several months. He then tenders it back. Here he has ratified the purchase by use of the car for an unreasonable length of time after attaining majority and thereby becomes bound

to his bargain. If in this case he had destroyed or sold the car before arriving of age, the mere passage of time after he became of age would not ratify. He could disaffirm when sued.

Liable for value of necessaries. A minor must pay the reasonable value of necessaries actually supplied him. If he could not so bind himself, he might be compelled to go in want.

Necessary defined. A necessary in this connection may be defined as anything required by a minor for his physical well-being or for his common school education. Or we may more adequately describe a necessary as anything required by a minor as (1) food; (2) lodging; (3) raiment; (4) health requirement; (5) working tool (when earning his own living); (6) common school education.

To be a necessary, the station of life of the particular minor is to be considered. This principle sometimes confuses the student into thinking that anything which is *usual* for a rich man's son may be classed as a necessary. But this is not true. To be a necessary, the thing obtained must come under the headings we have indicated above and the station of life is to be considered in order to determine *quantity* or *quality* rather than *kind*. Mere luxuries are never necessaries.

It is for the *reasonable value* of the necessary for which the minor is liable. An excessive price agreed to by him would not bind him.

If a minor is *already supplied* or is being supplied with the thing in question, then what he obtains is not a necessary. Parties who deal with minors must decide at their peril whether he is supplied or is being supplied with the article in question.

Example 4. A, 18 years of age, is allowed to go away from home to attend a college, with money supplied by his father. He contracts for a room for one year; after a few months, he abandons the room for other quarters, and the owner is unable to re-rent it for the balance of the year (Gregory *v.* Lee, 64 Conn. 407); he also runs up a large bill for clothes of an extravagant style and far beyond his reasonable needs (Nash *v.* Inman, (1908) 2 K. B. 1). He is sued by the owner of the room and by the merchant. He puts in the defense of his minority. He may be held for the reasonable value of the room for the time he occupied it. He cannot be held for the remainder of the term. He cannot be held for the clothes in so far as they are superfluous for his reasonable needs.

Example 5. A, the minor son of a very rich man, buys an automobile upon credit and also joins a club. Both of these acts may be regarded as not unusual for one in his station of life, but they are mere luxuries, not necessaries, and the minor may repudiate in both instances if he so desires.

OTHER PERSONS UNDER DISABILITY AS PARTIES

Insane persons. The power of an insane person to contract depends upon a number of questions: whether he has been legally declared insane; whether, if that is not a fact, the other person knew of his insanity; and the local statutory law. We may lay down as a general rule sufficient for our purposes here that an insane person who has been adjudged insane and who has been committed or for whom a conservator has been appointed, has no power to contract; that one who has not been judicially cared for may make *voidable* contracts, and may bind himself to pay for his necessaries; and that one who deals with an insane person knowing him to

be such (except to supply him with necessaries or render services required for his case) is guilty of fraud.

Married women. A married woman by the common law could not contract. She had legal authority to bind her husband for her necessaries if he was not supplying her. By modern law, the power to contract freely has been bestowed upon her.

Corporations. The capacity of a corporation to contract is considered under the title " Corporations."

Questions and Problems

(52) What is meant by the phrase " party to a contract "?

(53) Who is the minor? What other word is used synonymously? Why does the law draw a distinction between a period in life called infancy or minority and another period called majority?

(54) A, a minor, contracts with B, an adult, for the purchase of a horse by B from A. When the time comes for the consummation of the bargain, B refuses to perform, and when sued, alleges A's minority as a defense. Is the defense good?

(55) A, a minor, purchases a bicycle upon credit. The merchant sues for the price. A alleges his minority as a defense. What must A do or show in order to prevail?

(56) A, a minor, purchases a gun from B. After he becomes of age, he sells it to a friend. He is sued by B for the purchase price. He alleges that when he got the gun he was a minor. Is the defense good? Why?

(57) P, at the request of D, a minor, paid D's board bill contracted previously by D while attending school. P now sues D for the amount of the board bill. Can he recover?

(58) P, at the request of D, a minor, loans D $100. Afterwards D spends the money for necessaries and consumes them. P sues D, and D pleads his minority as a bar. Is it a good defense?

(59) Are the following articles necessaries (assuming the minor is not already supplied and that they are suitable for the station in life of the person involved):

(*a*) A horse (Rainwater *v.* Durham, 10 Amer. Dec. 637);

(*b*) A watch (Peters *v.* Fleming, 6 M. & W. 42);

(*c*) Jewelry (Ryder *v.* Wombell, 15 Ark. 137);

(*d*) A college education (Middlebury Coll. *v.* Chandler, 16 Vt. 683);

(*e*) Bicycle for boy at work, used to go and come from work?

(60) A, a minor, buys an automobile with which to carry passengers for hire, thereby to earn his living. Is this a necessary? (Zein *v.* Centaur Motor Co., 194 Ill. App. 509.)

(61) What was the power of married woman to contract by common law? By modern law?

(62) Can an insane person contract?

CHAPTER IX

THE FORMATION OF CONTRACT: (2) THE OFFER AND ACCEPTANCE

OFFER AND ACCEPTANCE NECESSARY

A contract is an agreement. We must have in true contractual liability the *consent* of the parties concerned to all the terms. The consent is obtained by a proposal on one side accepted by the other. The proposal is called an *offer;* its author, the *offeror;* and the party to whom it is addressed, the *offeree.* The consent to the offer we call the *acceptance,* and the offeree then becomes the *acceptor.* If the offeree replies by a modified or counter proposal, he then becomes the offeror and the original offeror becomes offeree. Such counter offer may be in turn rejected and the original terms again proposed or some compromise suggested. Finally the contract may result or the effort to agree may prove futile.

The offer and the acceptance may either or both be *express,* either in written or spoken words, or *implied* from acts; except that in certain cases, as we shall see, the law requires writing.

After a contract is made it is usually immaterial which party was offeror or offeree. But where the existence of a contract is in question, it may be very important to inquire which person is offeror and which

offeree, as an offeror may always withdraw the offer up to the very moment of acceptance, but an acceptance cannot be withdrawn, for at the moment it is made, the contract becomes effective. Both parties are then bound.

The following case illustrates the necessity that there be offer and acceptance in every contract.

> **Example 6.** A has a stubble field in which B has a stack of hay. A starts a fire in the stubble at a remote part of the field, which owing to freshening winds, threatens to destroy the stack. A, without B's knowledge, and in order to save the stack, removes it. He then sues for compensation for his labor. There is no contract and A cannot win. (Bartholomew *v.* Jackson, 20 Johns. N. Y. 28.)

PROPOSITIONS WHICH DO NOT CONSTITUTE OFFERS

Introductory statement. We have seen that an offer consists in a proposition made by one to another, but we must be careful to notice that all propositions do not constitute offers which by acceptance will result in contract. A reference to the various situations will make this clear.

Acts done in mere kindness, according to prevailing standards of interpretation, are not of a contractual nature.

> **Example 7.** A's home being on fire, he requests B, a neighbor, to help him get out the furniture. B accedes. The act is not done with evident contractual intent. B's secret intent to make a claim would not avail as A would be entitled to attribute to B the intent usually manifested by parties in similar situations.

Preliminary propositions made to induce offers, sometimes called *invitations to treat*, must be carefully dis-

tinguished from offers. Here we often have very close and difficult cases to decide, but the distinction in principle is very clear. Merchants constantly send out circular letters or even individual letters stating that they have commodities on hand which they "offer" at prices quoted; they publish lists and catalogues, which they send out indiscriminately to possible customers; they advertise auction or bargain sales. In none of these cases could it justly be said that the merchant does not reserve his right to choose his customers when orders are sent in, to look up credit ratings, to advance prices without notice, and even not to hold advertised sales. In such cases, the phrase "subject to prior sale," or equivalent expression, is often put in, but this is unnecessary, although always advisable because in any case it may save friction and, indeed, may prevent a law suit.

Example 8. A has a mail order house and sends out catalogues describing articles and giving prices. B sends in an order. Here, A's proposition is merely preliminary. B is the offeror, and A may accept or not as he chooses.

Example 9. In the same case, A sends out circular letters. Such letters are not offers. The replies ordering goods are the offers.

Incomplete propositions. A proposition, even though intended to result in contract, cannot be a technical offer if it is in any respect incomplete as to terms. Terms, however, need not be expressed when it is clear by fair inference that they were meant to be implied.

Example 10. A proposes to sell B his horse Tom, but he states no price. This proposition is not complete enough to constitute an offer, as even if B accepted, the parties would still be unagreed as to price.

Example 11. A orders groceries from B saying nothing as to price. Here there is an offer as it is to be inferred that A intends to pay the usual or market price.

Propositions not communicated. A proposition not communicated cannot be an offer. This lack of communication may consist in the fact that the party who claims to have accepted may have been ignorant of the offer when he did the act; or it may consist in the fact that the offer, though perhaps framed, has never been given out or sent to the other party although he may have learned its terms before he made his attempted acceptance.

Example 12. A offers a reward for information leading to the conviction of C, an accused person. B furnishes the information not knowing of the offer. There is no contract in this case and B cannot recover.

Example 13. A writes a letter to B and puts it on his desk, never delivering it. B sees it and clandestinely reads it and then attempts to accept it. As A's offer is incomplete, B cannot accept it.

THE DURATION OF THE OFFER

Introductory statement. An offer manifestly does not continue to endure for purposes of acceptance forever. When a person claims to have accepted an offer and so closed a contract, the offeror may claim that the offer is no longer open. There are various possibilities in fact to affect the answer.

Right to withdraw offer before acceptance. We should notice at first that any offeror may withdraw his offer at any time even if he has promised to keep it open for a longer time. This is for the reason that if

both parties are not bound, one cannot be. If, however, one makes an offer and then *for a consideration received*, promises to keep the offer open, he cannot withdraw as he has a contract to keep his offer open.

> **Example 14.** A writes to B, offering to sell his horse Tom at prices and terms stated, saying that he will give B two weeks in which to accept. The next day he writes to B saying that he has withdrawn the offer. He may do this and the offer is thereby terminated. If B had paid A (say) $10 for keeping the offer open, then A could not have withdrawn.

Duration where time not expressed. In this case the offer remains open a reasonable length of time, and what is reasonable depends upon many considerations, as, the various dealings of the parties, the customs of the community, the nature of the subject matter. Thus, an offer to sell land might be held to stand open several days, but an offer to sell stock, whose value is subject to frequent change, would expire quickly.

Termination of offer by refusal. The offeree's refusal will terminate the offer. For in such a case the offeror should be free to look elsewhere.

Counter offer is refusal. Within the rule stated above a counter offer is looked upon as a refusal and the original offer is thereby terminated.

> **Example 15.** A writes B offering to sell B five car loads of lumber at terms stated giving B five days in which to accept. B answers within the five days, offering to take the lumber, adding that it must be " surfaced two sides and counter matched." A refuses. B then, still within the five days, writes that he will accept the original offer. A is not bound to accept, as A's original offer was discontinued by B's counter proposal. (Shaw *v.* Ingram Day Lumber Company, 152 Ky. 329, 153 S. W. 431.)

THE ACCEPTANCE

The acceptance must be in terms of and during life of offer. In considering the offer we have already noticed this truth. Example 15 is a good illustration of the principle.

Communication of acceptance. The acceptance may be by word or act, according to the mode of acceptance contemplated by the offer. There need not always be a communication of the acceptance at the time the acceptance is made, where the acceptance consists according to the contemplation of the parties in an act done. If the acceptance is to consist in a promise, it must, of course, be uttered and communicated to the offeror or his agent in that behalf. Mere mental determination is not enough.

Example 16. A writes B, a carpenter, that B may make some benches for him to put in A's yard. B starts work, not replying to A's letter. When the work is done, B tenders it to A. A refuses to accept it. There is no contract and A cannot be held.

Example 17. A offers a reward to anyone who will get the most subscriptions for A's newspaper within a certain time, and other rewards to all persons who will obtain at least fifty subscriptions. B obtains the highest number and C, D and E each gets fifty subscriptions. The acceptance is complete by the doing of the act.

Example 18. A writes B that if B will extend credit to C, A will pay if C does not. B receives the letter and on the faith thereof, sells C goods. The acceptance is complete by the act of selling the goods, but B must give A immediate notice that he has accepted A's offer. In this case the acceptance may be by act done, for the offer contemplated such a case, but it is a condition of A's liability that he be timely informed.

Communication of acceptance to agent of offeree; acceptances by mail or telegraph. We shall see under the discussion of the law of principal and agent that any person may carry on his activities with others through other persons who are called his agents. The important thing is that the agent shall be authorized by his principal's act or word to take care of the matter in question. Clearly an agent may and very frequently in commercial life does have power by implication or express grant, to accept offers on behalf of his principal, and this may be true, of course, whether or not he made the offer.

Where offers and acceptances are made by mail or telegraph, it becomes important to determine at what point the contract may be said to be complete. Is it upon the mailing or telegraphing of the acceptance or is it upon its receipt by the offeror? It is well settled that if the offeree accepts through the medium suggested by the offeror, the contract is complete when that medium is used. Thus if A sends B an offer and notifies B to accept by mail, the contract is complete when B drops the letter in the post office, upon the theory that A has made the postal service his agency to receive his acceptance. The same is true where the advice is to use the telegraph. Suppose, however, nothing is said as to the medium of reply. From the authorities we are safe in saying that usually where an offeror uses the mail and says nothing about the manner of replying he impliedly suggests the mail as the agency to receive the answer; and if he uses the telegraph he impliedly suggests that agency. In such cases the contract is complete when the answer is mailed or telegraphed.

Thereafter the offeror's retraction is ineffective, and whether the answer reaches him or not is immaterial. But the acceptance may be made by any means of communication if it actually reaches the offeror within the time of the duration of the offer.

Example 19. A writes B an offer asking for a reply by return mail. The contract is complete when the letter is dropped in the mail box, and it is immaterial whether the letter reaches A or is delayed. If in this case B should wire A his answer, the contract could be thus closed provided the telegram would not only reach A but reach him within the time in which the offer is outstanding.

Example 20. A telegraphs to B an offer, saying nothing as to mode of reply. B telegraphs his reply within a reasonable time. The acceptance is complete when the telegram is given to the telegraph company and delay or loss is a risk assumed by A, not by B. (Ayer *v.* W. U. Tel. Co., 79 Me. 493.)

Questions and Problems

(63) Define offeror; offeree.

(64) How shall we determine, there being nothing said about compensation, whether an act was done as a mere favor, or for expected pay?

(65) A wrote B "Kindly advise me by wire if you can use 1500 creosota barrels between now and January 1st, at 95 cents, delivered in car load lots." B answered, ordering the barrels. Is there a contract if for some reason A does not care to fill B's order? (Cherokee Tanning Extract Co. *v.* W. U. Tel. Co., 143 N. C. 76.)

(66) State Example 8.

(67) State Examples 10 and 11, showing the reason for the difference in the solution.

(68) A, being very anxious for certain information, tells B that if C will bring him the information, he will pay C one hundred dollars. C, not knowing of A's promise to B, brings the infor-

mation to A. Later B tells C of the statement and C sues A. Can he recover the $100?

(69) State Example 13.

(70) Why may A in Example 14 withdraw his offer?

(71) How long will an offer remain open for acceptance?

(72) State Example 15.

(73) Explain Example 16.

(74) Explain Example 17.

(75) Explain Example 18.

(76) A writes B making an offer, to which he asks B's acceptance by return mail. B drops a letter in the box to go by return mail. The letter is lost in the mails. Is there a contract? Suppose B had answered by telegraph and the telegram had not been delivered by the telegraph company, would there have been a contract? If the telegram had actually reached the offeror when would the contract have been complete?

CHAPTER X

THE FORMATION OF CONTRACT: (2) THE OFFER AND ACCEPTANCE (CONTINUED). VALIDITY OF ASSENT

INTRODUCTORY STATEMENT

We have learned what constitutes offer and what constitutes acceptance. But so far we have been dealing with situations in which we assume that the statements made on both sides express what each party desires and understands. Form and substance are in accord. Thus, A offers to sell B an automobile, and B accepts, all terms being agreed upon. This is a binding contract from all that appears. But we may find extrinsic circumstances which detract from the validity of the assent which seems to have been given. A may have defrauded B; or A may mean one car and B another; or B's promise may have been extorted from him by force or threats; or unknown to either of the parties the car may have been destroyed at the time the attempted bargain is made.

These extrinsic circumstances may be of such character as to absolutely prevent contract, or they may merely give the party imposed upon the right to withdraw if he chooses. In the first class of cases the contract is *void*, or, better, was never really made, and cannot be ratified, while in the second situation the contract

is voidable, and may become binding by the ratification of the party entitled to avoid it.

FRAUD PREVENTING CONTRACT

One may appear to be a party to a contract which he never intended to make. I may by fraud be induced to sign my name to a promissory note, intending to sign a receipt. In that case it is not my note as my intention does not accompany my act. And my negligence in not reading the paper is immaterial when my act has been induced by fraud. This does not mean that a party will not be bound upon a contract which he signs without reading. He will be bound, unless fraudulent statements are made concerning its contents and he relies upon these statements.

Example 21. A states that he is paying a hospital bill for X and asks X to sign a receipt for it. X does so, not reading it. The paper is in fact a note. X is not bound.

MISTAKE PREVENTING CONTRACT

A mutual mistake of fact, as to existence of subject matter, or identity of subject matter, will prevent a contract from being formed.

Example 22. A offers to sell B a horse, giving a general description. B agrees to buy. A has in mind one horse and B, another, as can be shown. There is no contract.

Example 23. A offers to sell a certain horse to B. B agrees. The horse is already dead, unknown to either. There is no contract.

A mistake as to *value* or *quality* will not invalidate an agreement.

Example 24. A has an old book which he sells to B, a book dealer, for two dollars. The book is a rare copy and worth one thousand dollars, as both subsequently learn. A seeks to set aside the sale. He will be unsuccessful. The contract is valid.

FRAUD IN INDUCEMENT OR CONSIDERATION

Fraud in inducement or consideration defined. Fraud in the inducement or consideration is that sort of fraud whereby a person is prevailed upon to do an act because of the misstatements of another. When he does the act, he really intends to do that very act, but his intention is induced by the fraud practiced upon him by the other party to the contract, as to the importance or consequence thereof.

Example 25. A induces B to buy mining stock and to give his promissory note for the price. A accomplishes this by telling B that the mine has a certain output. As a matter of fact it is not in operation at all. In this case, B's intention is to buy the stock and to sign the note, but the inducement is fraudulent.

Elements in fraud. To constitute fraud, there must be (1) a statement of fact (2) made to be relied upon (3) with knowledge of its falsity or with careless disregard as to whether it is true or false and (4) relied on by the party to whom made (5) to his damage.

Statement must be one of fact, not of opinion or prediction. One's opinion, though given in bad faith, cannot be made the basis of a charge of fraud. A little consideration will show why this must be so. Men who are trying to drive bargains are always extravagant in their assertions of value or worth. An automobile salesman will call his car the best on the market;

a real estate dealer will speak glowingly of the future of the property he seeks to sell. It is an old saying that a dealer will "puff his wares," and the law allows him to do so. We cannot base law suits upon the truth of these predictions or opinions. Every one ought to know their true value and discount them for what they are worth. A purchaser must be upon his guard. He stands at arm's length and must beware that he protects his own interests. But if *statements of fact* are made, he must be able to rely upon them. If one party cannot take the other party's statements of fact as true and contract in reference to those facts as stated, we should have such investigation and precaution required as would preclude all dispatch in making contracts. If one states a fact he should be held to it, but if he states an opinion it should be received as such.

Example 26. A new tire company is being formed. Stock is offered at a great discount. The promoter asserts that in his opinion stock will be selling on the market at par within one year. A having faith in the promoter's statement buys the stock. The company fails. There is no fraud and A has no relief.

Example 27. A desires to sell B a delivery truck. B is a grocer employing two delivery boys driving horses and wagons. A tells B that if B will buy the truck he can dispense with the services of one of the boys and that his business will increase fifty per cent. B finds that he cannot dispense with either boy and that his business does not increase, and therefore he seeks to set aside the bargain. He cannot prevail. The assertions were mere trade talk.

Silence as fraud. To remain silent about a fact, allowing the one party to remain ignorant of facts known to the other, is not fraud in the ordinary case.

Example 28. A wishes to buy B's land. A has learned that a street railway is projected in the neighborhood, which will materially increase the price of B's land. B does not know this and sells to A much cheaper than he would have done had he known the facts. The sale is valid. A's silence is not fraud.

There are some cases, however, in which to remain silent is to accomplish a fraud. They are the cases in which the circumstances impose a duty upon one to speak. There are three sorts of circumstances in which this duty arises:

(1) Where the facts known to one party are practically unavailable to the other upon reasonable investigation.

(2) Where the parties stand in a relation of trust and confidence.

(3) Where the nature of the contract is such that full disclosure is of its very essence, as in contracts of insurance and suretyship.

Example 29. A has cattle which are affected, to A's knowledge, with "Texas Fever," a disease not apparent upon reasonable inspection. He offers the cattle to B at prevailing market prices. B buys. A's failure to disclose is fraud and B can rescind the sale or sue A for damages. (Grigsby *v.* Stapleton, 99 Mo. 423.)

Example 30. A is B's agent to sell real estate. A offers to buy it himself. He has knowledge of facts which affect the value and which he knows to be unknown to B. He remains silent upon these facts and makes B a low price. B accepts. B can set the transaction aside as the relationship of confidence puts B off his guard.

Relationships of this sort are those of attorney and client, physician and patient, parent and child, trustee and beneficiary, principal and agent.

Active concealment as fraud. If one conceals facts so that the other party will be prevented from discovering what research and inquiry might have shown, the concealment constitutes fraud.

> **Example 31.** A desires to sell B a mine. It has been worked and abandoned. He puts boards over old openings and covers them with dirt, and thus conceals the true character of the mine. A's conduct amounts to fraud.

Results of fraud. Where there is fraud in the inducement, such as we have been discussing just above, the contract is not void, but avoidable at the instance of the defrauded party. He can have the transaction set aside, but in that case he must be willing to put the other party *in statu quo* by a return of the consideration. Or he can sue for damages. But as the transaction is voidable, not void, he must act in timely, positive fashion upon discovering the fraud; otherwise he will be considered as having ratified the contract, and from that time on it will be as absolutely binding upon him as though it had been so in its inception. Or he can show by his statements that he intends to stand by the bargain. That is called express ratification.

DURESS

Duress defined. Duress in the law means unlawful compulsion. We have learned that a contractual obligation is one which a person takes upon himself voluntarily. It is the essence of a contract that it must be freely assumed.

Kinds of duress. Duress is said to be by imprisonment and *per minas*, or by threat. The law will not

allow one to obtain a contract from another by means of his imprisonment. It is duress per minas which raises the most difficult questions. What degree of threat is required to make a contract voidable? It was said in the early law that threats would not invalidate a contract unless they were such as to overcome the will of a constant and courageous man. Later, the view was adopted that such threats must not be used as would overcome the will of a person of ordinary firmness. But the more modern and better rule is that any threats that will coerce the will of the person involved, considering all the circumstances of the case, will amount to duress.

UNDUE INFLUENCE

One may have such influence over another party that that which is done by such party may be considered as practically dictated by the dominant party. Whenever it is shown that such a relationship exists between parties as raises a presumption of dominance by one party over the other, undue influence will be presumed. "Courts of equity have refused to set any bounds to the circumstances out of which a fiduciary relation may spring. It not only includes all legal relations, such as guardian and ward, attorney and client, principal and agent and the like, but it extends to every possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side and resulting domination on the other." (Mors *v.* Peterson, 261 Ill. 532.) When a contract has been secured by such a person, it may have been fairly secured, but the burden of proof is upon the dominant party to show that not-

withstanding the relationship, the contract was freely made by the other party.

A contract secured by undue influence is voidable, not void; and consequently it may be ratified by the affirmance of the party influenced after the influence has ceased to operate.

Questions and Problems

(77) A requested B to sign a recommendation whereby A could obtain employment in the X Mfg. Co. B agreed and signed, without reading, a paper which A presented. The paper was a promise to pay money setting forth a valid consideration as having been received by B. He is sued upon this paper and his defense is that he did not know what he was signing. Is this defense good? (Smentek *v.* Cornhauser, 17 Ill. Ap. 266.)

(78) A has a jewel which he thinks to be a topaz. He asks B what he will give him for it. B, thinking it also a topaz, replies that he will give $1. A sells to B. Both learn later that the stone is an uncut diamond worth $700. Can A have the sale set aside?

(79) Plaintiff purchased a twelve acre tract of land. He claims that defendant falsely represented the prices at which certain sales had been made and the amounts of specific offers for similar property in the vicinity and misrepresented the general selling price. The defendant claims that such representations by him would not constitute fraud in law. How should the case terminate? (Brody *v.* Foster, 158 N. W. (Minn.) 824, L. R. A. 1916 F. 780.)

(80) A sells B a patented fence, lauding it as a "good invention." B does not find it a good invention. B seeks damages for fraud. Can he recover?

(81) What is the case in Example 25?

(82) What is the case in Example 26?

(83) What is the case in Example 27?

(84) A buys mining stock from B who makes gross misrepresentations as to the facts. One month thereafter A discovers

the fraud. He makes no objection for over a year and then seeks to get his money back. Can he recover? What principle is involved?

(85) What is duress; what two kinds?

(86) A tells B that unless B will sign a certain contract, he will burn down his house. Thereupon B signs. Is the contract good, void or voidable? Why?

(87) Define undue influence. When is it presumed? Can the presumption be overcome? How? Does undue influence make a contract void or voidable?

CHAPTER XI

THE FORMATION OF CONTRACT: (3) CONSIDERATION

DEFINITION AND NECESSITY OF CONSIDERATION

What consideration is. We are taught to keep our promises. But the law will not require us to keep them unless there is a *consideration* in support of them. It is this essential element in simple contracts (whether they are in writing or not) which we are to notice in this chapter. The English and American law regards a promise without consideration as *nudum pactum*, not creative of any legal liability.

What is consideration? It is frequently defined as a detriment to the promisee or benefit to the promisor. This means that the promise which is sought to be enforced must have been made mutually with a benefit received by the promisor or a detriment sustained by the promisee. In other words a promise is not enforceable unless *a price has been paid or promised* for it. We have said that consideration consists in a benefit to the promisor or detriment to the promisee, but it is the detriment to the promisee that is more to be regarded than the benefit to the promisor. If a person makes a promise which calls for something to be given, done or undertaken by another and the other gives, does or undertakes that which is called for, it is this fact that is important

and it is not usually necessary to consider whether the result is actually any benefit to the promisor. Let us consider a few examples.

Example 32. A promises to pay B $1000 on B's twenty-first birthday, and B agrees to accept it. B cannot make A pay, for B has given nothing — thing, act, or promise to give anything — to A for A's promise.

Example 33. A promises to sell B a horse for $200 upon B's next birthday and B accepts. Here there is a price paid by both parties. A and B are both promisors. The consideration for A's promise is B's promise, and *vice versa*.

Example 34. A offers a public reward for certain information. B brings in the information. A is the promisor. B never was a promisor but he paid the price which the promise called for.

Example 35. A writes to B that if B will sell goods to C, A will pay if C does not. B sells the goods on the strength of the promises of both A and C. A gets no actual benefit, but in legal contemplation B has given up a right on the strength of A's promise. It might or might not be actually beneficial to A. It is enough that it will be detrimental to B to do the thing unless A's promise is kept.

Adequacy of consideration. An *adequate* consideration is not necessary to a contract. As one may give away what he has, he may agree to part with it for whatever price he chooses. To be sure the law will not enforce a promise to make a gift; but if it were to inquire into the adequacy of price paid, it would take from parties the right of contract to fix their own prices and make their own bargains; and to deny that would largely destroy freedom of contract.

There are aspects from which adequacy of price is material as where fraud is alleged and the inadequacy

of the consideration is a part of the proof; or where some unusual relief of an equitable nature instead of damages for breach is being asked for by a party who has driven a hard bargain. But mere inadequacy of consideration is not material in a suit for damages for breach of contract.

EXAMPLES OF CONSIDERATION

In general. Having now before us the definition of consideration and remembering that consideration is an essential element in every simple contract whether oral, written or implied, let us now look at various situations to discover concretely and illustratively what may constitute consideration. And first we should notice that one may be said to have given a consideration whenever he parts with anything to which he has a legal right, and, generally speaking, it is of no moment how slight the legal right is.

Promises as consideration. A promise definite enough to be enforced, is a good consideration for a thing done or promised on the other side.

> **Example 36.** A promises B that he will sell B all the coal B may desire to buy of him during the next six months at certain prices. B says "I accept." Here there is no contract for B doesn't promise to buy any coal or give up any right to buy coal from anyone else. (Amer. Cotton Oil Co. *v.* Kirk, 68 Fed. 791.)
>
> **Example 37.** A offers B all the coal up to 100 tons which B may use in his foundry business during the next six months, at prices quoted. B agrees that he will buy according to this offer. This is a good contract as B gives up his right to buy this coal from any other person and A must stand ready to deliver the coal when ordered. (Nat. Furn. Co. *v.* Keystone Mfg. Co., 110 Ill. 427.)

Giving up right of course of conduct. We get a good insight into the nature of consideration by noticing cases in which one gives up the right to pursue any course of conduct which he may legally follow. Thus, A's uncle tells A that if he will go to college, he will pay him $1000 upon A's twenty-first birthday. A goes in response to the promise. A can recover the money. A has a legal right not to go to college. He foregoes that right upon the uncle's promise. (Hamer *v.* Sidway, 124 N. Y. 538.)

Performing legal obligation as consideration. Our definition of consideration tells us that a legal right must be forborne or promised to be forborne. One has no legal right not to perform his legal duty, for then it would not be his duty.

> **Example 38.** A promises a sheriff $100 if the sheriff will arrest a lawbreaker in his jurisdiction. The sheriff accepts and makes the arrest. He cannot recover the reward. His agreement is both illegal and without consideration.

Performing executory contract as consideration. If one promises to dig a ditch for $50 and afterwards says that he will not proceed unless he is paid $100, and the $100 is thereupon promised and he digs the ditch, the logical objection is that he is not giving up any right; he was already legally bound to dig the ditch. And yet we must also remember that parties may always by agreement abandon a contract or a term in a contract and substitute a new one. But the law in most jurisdictions has been laid down that if one threatens to break a contract unless he gets more pay, and the increase is thereupon promised, and there is no further

element in the case, the increase cannot be collected.

Partial payment of debt as full satisfaction. It was decided in some old English cases that a part payment of a liquidated debt could not be a consideration for a promise to release one's claim for the balance, inasmuch as theoretically a debtor gives up nothing he is entitled to, and a creditor gets nothing he is not entitled to, when a debt already owing is paid. These early decisions have been followed generally in modern law although often with great reluctance. If A owes B $100 and B agrees with A that if A will pay him $75, he will give him a receipt in full or a release of the debt, justice would seem to require that this agreement be held binding. But the decisions have been otherwise; for, it is said that A parts with nothing to which he had any right in return for the release. However, the rule is confined strictly to this situation. If there is any detriment besides the part payment of the debt, consideration exists and the release will stand. An example will illustrate this.

Example 39. A owes B, C, D and E each $100, all of which debts are due except the one to E. Desiring to settle with all his creditors at fifty cents on the dollar, he makes separate individual agreements with each of them as follows: to B he gives $50 upon B's promise to release the entire debt; to C he gives a secured promissory note for $50 due in three months; to D he gives a horse worth $50; to E he makes a payment of $50 at once although the debt is not yet due. All of these creditors agree to accept what they receive in full payment of the debt. The legal results of the various agreements are: B may sue for the remaining $50 but C, D and E are bound by their promises, as being upon sufficient consideration.

Liquidation of an unliquidated claim. What has been said in the above paragraph and example deals strictly with debt whose amount or existence is not in dispute. If a claim is unliquidated, any agreement for its liquidation is enforceable. A claim may be said to be unliquidated when it is not certain in amount or capable of being rendered certain by mere computation. It will be deemed unliquidated when (1) there is a *bona fide* dispute as to the amount of a debt; (2) where the claim is of a nature (as in case of breach of contract or commission of a tort) which either requires an agreement or a law suit to establish what amount is due. In such a case, manifestly any agreement establishing the amount due is based upon a good consideration and is enforceable.

> **Example 40.** A claims rent from B in the sum of $75 for the month of June. B claims a set off for repairs made by him which he claims that A, as landlord, should have made. A claims that he is under no duty to make the repairs. B sends A a check for $50 stating that it is in full payment of A's claim. Here if A agrees to receive the $50 in full settlement; or if, asserting he does not agree to it, nevertheless keeps and uses the check, he cannot succeed in a suit for the balance. One must retain a payment under the conditions on which it is sent. Otherwise he should send it back. (Note here, that if the debt was liquidated, *i.e.* indisputably $75 and B had sent $50 in full payment, A could have so received it, and still have sued for the balance, for, although his retention would be a retention upon the terms upon which the payment was made, there would be no consideration making those terms enforceable.)

Compromise of disputed claim. If the entire claim is disputed, any agreement to settle it is supported by a

good consideration. The claim must be made, of course, in good faith. The claimant gives up his right to have his claim tried out in court. This is good consideration.

> **Example 41.** A's automobile collides with B's automobile injuring B's car. B claims damages. A claims that the collision was B's fault, but nevertheless promises to settle for $100 and B agrees to this. This constitutes a contract on which B can sue, and it is absolutely immaterial what the result would have been had B sued A in court for the injury. The agreement will stand and the court will not go into the merits of the original controversy so long as there was good faith.

Composition with creditors. What we have said above refers to settlement of a debtor with his sole creditor or with one of his creditors, or if with more than one, by separate contracts with each. Often a debtor who is hard pressed by his creditors proposes terms of settlement with them to be accepted by them in consideration of the assent to the settlement by the others. The arrangement may include all of a debtor's creditors or a part of them. Non-assenting creditors will not be bound. This is called a composition with creditors and has always been considered binding, whether the debts are liquidated or unliquidated.

> **Example 42.** A owes B, C, D, E and F each $100. He calls them together and they all agree with him and with each other to accept a compromise. They are bound and cannot afterwards assert claim to the balance.

In conclusion, as to payment of disputed claim and part payment of debt as consideration for release in full, we may say that a part payment of a debt upon an agree-

ment that the part payment is to be received in full payment, will operate to discharge the balance of the debt, if

(*a*) The debt is paid before it is due; or

(*b*) At some place other than where payable;

(*c*) Some new security is given;

(*d*) Some act is done or thing given in addition to money or in lieu of money;

(*e*) The amount of the debt is unliquidated;

(*f*) A disputed claim is compromised;

(*g*) A composition by a debtor with his creditors or some of them is effected.

Questions and Problems

(88) Define consideration. Why do we describe it as a *detriment to the promisee?*

(89) Is it material in any case whether the promisor was actually benefited? Why?

(90) A sells B a horse for $100. A refuses to deliver the horse, and being sued, attacks the transaction on the ground that the consideration was inadequate as the horse was worth $400. Is the contention good?

(91) A offers to supply B during the season of 1918–1919 with all the paper of a certain description which B may desire at certain prices. B writes back saying, "I accept your proposition." Is there a contract?

(92) State the case in Example 37.

(93) A takes a child from an orphan asylum, who, becoming homesick, wishes to return. A says, "Stay with me for the time being and I will leave you $1000 in my will." The child does stay until A's death, but A leaves no will. The child sues the estate. Can he recover? (Baumann *v.* Kusian, 164 Cal. 582, L. R. A. N. S. 756.)

(94) A promises B that if B will name B's child after A, he will give B $1000. B does name the child as requested. Can

he recover the $1000? (Gardner *v.* Denison, 217 Mass. 492, 51 L. R. A. N. S. 1108.)

(95) A owes B $100. He tells B that he will pay him $75 if B will take that amount in satisfaction of the entire debt. B agrees and gives a receipt to that effect. B afterwards sues for the $25. Can he recover? Why? Do you regard the rule as good or bad from a business standpoint?

(96) Suppose in the case above put (*a*) that the amount was disputed, or (*b*) that the payment of the $75 was made before the $100 was due, or A's secured note for $75 was received by B; in all of these cases the agreement being to receive in full, would the agreement legally so operate? Why?

(97) If A injures B and B claims it was A's fault, but A claims it was B's fault and finally A agrees to give B $100 to settle his claim, will the court allow A when sued for his promise to show that B's original claim was invalid? Why?

(98) What is a composition with creditors?

CHAPTER XII

THE FORMATION OF CONTRACT: (4) LEGALITY

LEGALITY AN ESSENTIAL ELEMENT IN CONTRACT

Legality necessary. It is obvious that one cannot ask the courts to give him relief in the enforcement of an agreement forbidden by law. We need no more than state the fact that legality is essential as a basis for a consideration of the different types of illegality.

Why certain agreements are illegal. Agreements are illegal because (1) their object is contrary to the common law or public policy; (2) their object is contrary to some statute; (3) their manner of formation is contrary to public policy or statute.

It is evident that aside from those acts condemned as illegal by all men in all ages, the legality of contracts is a subject changing with the changing ideas of men and with the necessities of the times.

PARTICULAR CLASSES OF ILLEGAL AGREEMENTS

Wager contracts. Wager contracts were not illegal at common law, unless they tended to a breach of the peace or were of a scandalous nature, but statutes have made them illegal. A wager contract is one in which a risk of loss is created by the agreement itself according to some outcome or fact. One may wager or gamble on the fall of cards, the outcome of a horse race, future

market prices. An *option* contract whereby one acquires a right to buy or sell at a future time at prices stated, is void, if the intention is to gamble on future prices, but otherwise it is good.

Example 43. A desires to sell B a house but B is uncertain, yet wishes to have an option for a week. He therefore gives A $100 upon A's promise to keep the offer open for a month. The contract is not illegal.

Example 44. A offers to sell B wheat on May 30th next at $1.10 a bushel and for $100 paid, B has until May 30th to refuse or reject. If the bargain is not *bona fide* and the parties merely intend to gamble on future prices, the agreement is unenforceable.

Contracts in restraint of trade. A contract in restraint of trade is not void unless it is in *unreasonable restraint.* Such contracts are frequently made in connection with a sale of a business and are necessary to enable one to deliver the *good will.* But if the agreement made is *unreasonable,* it will be void. Whether it is unreasonable depends upon the question of what is necessary for the protection of the purchaser.

Example 45. A has a restaurant in the business center of the city of Chicago. He sells it to B, agreeing that he will not for the period of ten years compete with B in the restaurant business within a two mile radius of the location of the restaurant. This agreement is reasonable and if A could not make it, he would really not be able to secure B in his acquisition of the good will which is perhaps the most valuable part of the business. If the agreement had been not to engage in the business anywhere in Illinois the agreement would have been void, as such limits would be unnecessary for B's protection.

What contracts are in illegal restraint of trade is now, from some standpoints, a subject of much controversy

and in process of development. With the means of rapid transit of intelligence and goods now at our command, enterprises of truly national scope cannot have proper protection against the competition of the seller of such a business unless he agrees not to compete at all or at least in very restricted districts. But in any event the restraint must be reasonable under the facts of the case.

Agreements of monopolistic tendency. Monopoly has always been contrary to the principles of the common law notwithstanding the practice of some English monarchs of granting monopolies. In the United States we have the well-known Sherman Act and the subsequent federal enactments making monopolies illegal and contemplating their prevention. The states have various anti-monopoly or anti-trust statutes. Not only do we have these various statutory provisions, but monopolies are obnoxious to the common law.

What is monopoly? It consists in the control of the sources of production. Such control need not, of course, be absolute. Agreements for the purpose of stifling competition and keeping up prices are monopolistic.

The corporate "*trust*" is monopolistic and has been frequently declared illegal. Now the word "trust" has in law a much larger meaning than that in which it is used to indicate illegal combination of companies, and is one of the useful inventions of the law. It permits one to hold property for the use of another, as property left to A in trust for B. In this way estates can be kept intact while dividing the revenue, and spendthrifts and inexperienced persons can be given the benefit but not the control of properties.

This method of holding property was made use of by corporations to create combinations of rival companies to eliminate competition, give a common control and keep up prices. Such " trusts " are deemed illegal because of their objects.

> **Example 46.** The A, B and C corporations are in the same line of business. A scheme is promoted by which the stockholders of all the companies convey their stock to a common board, who hold such stock in trust, issuing trust certificates. In this way the stockholders still enjoy dividends, but the control of their property passes out of their hands and is vested in the common board. This scheme is illegal.

Corporation not illegal merely because large. A corporation is not an illegal thing merely because of its immensity. It is only when a corporation is guilty of unfair trade and of practices of monopolistic tendencies that the law will make it an object of attack.

Agreements tending to demoralize public service. Any agreement whose tendency (no matter what its actual result) is to demoralize the courts, the legislature or any branch of the public service, is illegal. Thus, of course, agreements to bribe, to suborn perjury or to buy votes, are illegal. So are lobbying agreements (agreements by which legislation is to be procured through personal solicitation), although it is not illegal for one to be employed to openly appear before legislative committees to present a certain viewpoint and urge legislation consistent therewith. It is the tendency of lobbying and all agreements affecting public service which makes them illegal, not the motive or the actual result.

Example 47. The B corporation procures A to go to the capitol for lobbying purposes to obtain the passage of a certain bill. A believes in the bill and undertakes to use his personal influence to get it enacted. A afterwards sues for his fee and the corporation pleads that the agreement was illegal. The facts that A's motives were good, that the bill was a good bill or that it would have passed without A's services are immaterial. The tendency of such an agreement is to produce corruption and it is therefore deemed illegal and is forbidden.

Usurious agreements. Usury is the taking of a greater rate of interest than is permitted by law. It is deemed illegal in the sense that it is not enforceable and under some laws entails a penalty, as for instance, the loss of all interest. The law of usury is quite different in the various states, although in nearly every state there is a law of usury.

Sunday agreements. An agreement made on Sunday, or to be performed on Sunday, is, by an old English statute, illegal, unless a work of charity or necessity. This statute has been copied in many jurisdictions, but in some states Sunday contracts are not contrary to law.

Questions and Problems

(99) A agrees with B that he will pay B $100 if the M ball team wins a certain game, in consideration that B will pay him $100 if it does not win. Is this agreement enforceable?

(100) A company having a business local to the State of Illinois sells it to B under the agreement that the seller shall not engage in that business anywhere in the United States. Is the agreement void? Why?

(101) What is corporate "trust"? Monopoly?

(102) The consul general of Turkey made a contract with a manufacturer of firearms, by which the consul, for an agreed

commission, was to effect, through his influence with government agents, sales of the arms manufactured by the concern with which he contracted. Is the contract good? (Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 276.)

(103) What is usury? What is the law on the subject?

(104) Is an agreement made on Sunday enforceable?

CHAPTER XIII

THE FORM AND EXPRESSION OF A CONTRACT

GENERAL STATEMENT

A CONTRACT may be in any form in which the parties choose to put it except where the law, for reasons of public policy, requires particular kinds of contracts to be expressed or evidenced in a certain way. The general rule is then that any contract may be oral or implied, or written or under seal, as the parties may choose to have it, but certain classes of contracts are required by law to be proved by or expressed in a certain form. The form in which contracts may exist and which are to be considered by us are (1) oral contracts; (2) implied contracts; (3) contracts in writing; (4) contracts in writing under seal.

ORAL CONTRACTS

Sometimes one hears it said that there is no contract between parties unless some written instrument has been drawn up between them, but a contract may, and very frequently is, merely oral, and it is in that case just as enforceable as though it is in writing unless it comes within the provisions of some statute requiring that particular sort of contract to be in writing. It is true that an oral contract is not satisfactory where the parties differ in their memory of just what transpired, or

where one of them unjustly denies that there was any contract, thus making the proof by the other more difficult and perhaps impossible. But this is a difficulty in the matter of evidence and does not go to the requirements of a contract as such.

IMPLIED CONTRACTS

Any contract that may be oral may be implied or partly implied. An implied contract is one in which the parties speak by their actions rather than by their oral or written words. It is as truly a contract as though words had been spoken, signifying offer, acceptance and consideration.

> **Example 48.** A requests B to help him build a house, and B acceding to the request performs the labor desired. Nothing is said about wages, but it is to be inferred, according to the reasonable interpretation to be put upon the acts of the parties, that A expects to pay and B expects to have the prevailing wages for that class of work in that community and B can sue for and recover such wages. The promise to pay is implied.

We say that an implied contract exists whenever the more reasonable explanation will show the relationship of the parties as being that of contract rather than that of some other relationship. If some other explanation is more reasonable, then the contract will not be inferred although it may be shown to exist by express agreement.

> **Example 49.** A's house being on fire, A requests his neighbor to help him carry out furniture, saying nothing about pay. No contract would be inferred in this case as it is a more reasonable explanation that A expected B to perform the act in a neighborly spirit, and that

B intended to do so, but if A expressly promised B pay for the services then that could be shown.

Example 50. A's son B stays at home upon the farm and does work for A. After A's death, B puts in a claim for services. B would have to show in this case something further than the facts stated, as the filial relationship explains the case more reasonably than that of contract. If B had been a stranger, then the inference would be that of contract between the parties unless it could be shown that B agreed to do the work without charge. (Hertzog *v.* Hertzog, 29 Pa. St. 465.)

We sometimes see the term "contract implied in law" as distinguished from the contracts above described which are said to be implied in fact. A contract implied in law is not really a contract at all but merely a set of facts from which the law will raise an obligation to pay regardless of the intention of the parties because of the justice of the situation. Thus A agrees with his housekeeper B that if she will remain with him until his death he will give her some land. He dies without having carried out his promise. This promise is too vague and uncertain to be enforceable, and there is not really a contract between the parties because of the uncertainty and indefiniteness of the terms stated between them. But the law will allow B to have reasonable wages from the estate as a matter of justice as upon a contract implied in law. But it is a misuse of terms which is to be regretted that such an obligation should ever have been described as a contract, as the parties never did contract for wages.

WRITTEN CONTRACTS

Contracts which cannot exist except in writing. Some particular contracts cannot have any existence unless

they are in writing. In fact the very definition of some sorts of contracts signifies writing. For instance, we cannot have a promissory note, a bill of exchange, a check, a bond or a deed to real estate unless there is a written instrument.

Contracts which cannot be enforced unless the evidence is in writing. The Statute of Frauds and Perjuries. In the seventeenth century in England it was considered by Parliament that perjury and fraud were frequently accomplished by means of false swearing to the existence of certain classes of contracts or to their denial. It was thought that reform in this regard could be accomplished by requiring the proof of such contracts, when sued upon, to consist in written evidence, signed by the parties sought to be charged, in cases in which the defendant denied the existence of the contract sued upon. Accordingly, in 1677, a famous statute was enacted which has persisted in the law until the present time in almost the same phraseology in which it was then passed, and which was entitled the "Statute of Frauds and Perjuries." The purpose of this statute is to require a certain form of proof which would eliminate the temptation and possibility of false swearing. Parliament did not by any means enact that all contracts must be so proved, but picked out certain exceptional classes of cases in which it regarded the danger as greatest. The contracts which were included are set out in the paragraphs following. There were two sections of this statute which concerned contracts and which are known as the fourth and seventeenth sections. They are in force substantially as then enacted throughout the American states, and the seventeenth section,

which covered the case of sales of personal property, has been incorporated into the Uniform Sales Act. On account of the fact that this statute has such an important part in English and American jurisprudence, it is desirable to set forth these sections verbatim. They read as follows:

"That no action shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that it is not to be performed in the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." (4th Section.)

"That no contract for the sale of any goods, wares and merchandise, for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." (17th Section.)

Promises by administrators and executors. A promise made by an executor and administrator to pay debts of the estate out of his personal estate cannot be enforced unless there is a written memorandum signed by the executor or administrator.

Promises to pay for the debt, default or miscarriage of another person. Such promises are not enforceable

unless there is a written memorandum signed by the party sought to be charged. This phrase chiefly covers the case of contracts of guaranty made by one to another's creditor.

> **Example 51.** A desires to obtain credit for goods purchased from B. B advises him that he will extend credit to him if he can secure a guarantor. A thereupon induces C to promise B that if A does not pay for the goods, he, C, will. C's promise is not enforceable unless there is a written memorandum signed by C proving the existence of the promise. It is immaterial what other proof B might have; unless he has a written memorandum to which C has attached his signature, he cannot enforce C's promise. Of course if C made such a promise he should in all honesty make good and in a great many cases the guarantor would not take advantage of this technical defense.

The statute was passed to prevent claims against alleged guarantors who did not make any such promises but must of course apply to all cases whether there was any real promise or not, otherwise the statute would be of no effect. It is therefore seen that the statute which was passed to prevent frauds can be made the means of accomplishing fraud, but it is regarded that the fraud which it prevents covers more cases than the fraud which it encourages.

Agreements made in consideration of marriage. A promise made in consideration of marriage is not enforceable unless in writing signed by the person sought to be charged. This clause includes ante-nuptial marriage settlements. It does not include mutual promises to marry which are enforceable though not in writing unless some local statute makes that provision.

Contracts for the sale of real estate or any interest therein. A contract for the sale of real estate or any interest in real estate is not enforceable unless there is a memorandum signed by the party who is sought to be charged. This covers cases of contracts to sell a parcel of real estate, to make leases, to grant easements, to execute mortgages and to give any interest of any sort in real estate. The statutes in the United States usually except from the provisions of this clause short-term leases, as for one or three years, which are enforceable in such cases although oral.

Example 52. A having a coal mine contracts with B to allow B to enter upon his land and mine coal in certain quantities and to take the same away. This agreement is not enforceable by either party unless the other party has a written memorandum signed by the party whom he attempts to charge.

Example 53. A agrees to mine 1000 bushels of coal and deliver it to B's place of business for certain prices and at certain times. The contract is oral. Either party can enforce this contract against the other as far as this section of the statute is concerned, for the contract is to sell personal property before the sale or transfer of title can take place. In the same way a sale of furniture would not be within this clause of the statute even though the timber from which the furniture was expected to be made was still growing.

Sales of personal property are not enforceable unless in writing as we shall see if there has been no part payment or part delivery. In Example 53 there might have been a part payment which would make the contract enforceable notwithstanding there was no writing.

Contracts which would require more than a year for performance. Such contracts are not enforceable un-

less there is a written memorandum by the party sought to be charged. This section only covers contracts which cannot be performed within a year by their terms, or in the nature of the case. If a contract can be performed within a year, even though it may not be intended that it shall be so performed, it is enforceable.

Example 54. A and B make an agreement whereby B is to work for A for fifteen months from date. Neither party can enforce this agreement unless there is a written memorandum signed by the party sought to be charged.

Example 55. A agrees to do certain work for B and to have it completed within fifteen months. This contract is enforceable though entirely oral because it may be completed within twelve months from the date of the contract although it may not be expected by either party that such shall be the case.

Contracts for the sale of personal property. A contract for the sale of personal property is not enforceable if the price agreed upon or implied is of a certain amount or over unless there is a written memorandum signed by the party sought to be charged, or unless there is a part payment or a part delivery and acceptance. It will be noticed that the seventeenth section of the Statute of Frauds provides for three ways of compliance, while the fourth section covering all the above cases contemplates only one way of compliance. Under the seventeenth section relating to sales, a sale of personal property is enforceable though not in writing if there has been a part payment or a part delivery and acceptance.

Example 56. A sells 1000 bushels of wheat to B for the sum of $1000. This agreement is not enforceable unless there is (1) a written memorandum signed by A or B depending upon which party we seek to charge, or (2) unless B

has paid A all or a part of the purchase money, or (3) unless A has delivered to B all or part of the wheat and B has accepted the same.

The memorandum and the signature. The memorandum required by the Statute of Frauds need not be of a formal character and may consist of entries in a notebook or upon any form of paper, and is sufficient if it merely notes down the terms and describes or names the parties. The purpose of the Statute of Frauds is not to require a formal draft of contracts which it covers. Indeed in many commercial cases the memorandum would be usually made in a more or less crude form, perhaps in lead pencil, and this would be sufficient as the only purpose of the statute is to prevent fraud and perjury in stating contrary to fact. The memorandum must sufficiently identify the subject matter and the parties. However, it is provided in many states that the consideration need not be in writing but may be proved by parol testimony to complete the evidence of the contract.

The memorandum may be made at any time prior to suit or even after suit is begun. There are cases in which a person desiring to get out of a contract of this sort has furnished the only evidence against himself by writing a letter in which he states he will not perform the contract. The existence of the contract is therefore proved by his own statement that he will not perform it. There is no purpose gained in requiring that the memorandum must be made at the time the contract is made, because if the party who desires to perform the contract can produce a written memorandum of its existence which is signed by the other party, the pos-

sibility of perjury has been as effectually done away with as though the memorandum has been made at the time the contract was made.

Upon the same reasoning it is immaterial that the signature of one party is lacking if the signature of the party sought to be charged is present. The party sought to be charged is usually the defendant or the party sued, and if his signature has been placed to the memorandum showing that he made a contract with the plaintiff no purpose would be served in requiring that the plaintiff's signature should also be attached.

The signature need not be at the bottom of the memorandum if included within the body and meant as a signature, as where one should say "I, John Smith, hereby have sold to Henry Jones," etc.

CONTRACTS UNDER SEAL

A contract under seal in olden times was a contract upon which as a sort of signature a piece of wax was attached bearing an impression, but in these days a scroll or scrawl opposite the signature has usually, and in most states legally, taken the place of the wax substance. By the early law this form of contract was of much more importance than it is to-day, as legislation has minimized, if not altogether abolished, its legal effect in many states. At common law a contract under seal did not need to be supported by consideration and all contracts were fundamentally divisible into two sorts; the contract under seal or "specialty" and all other contracts (whether written, oral or implied) known as simple contracts, or contracts by parol.

As a matter of fact the seal in early days was the signature of the party to the contract and has historically been replaced by the signing of the name which is now the custom, but the law in its regard to legal forms and ideas still retains, especially in some states, much of the law in respect to sealed contracts. It was the law, and is still the law in some states, that certain instruments were not effectual unless under seal, as, for instance, deeds to real estate, powers of attorney to execute sealed instruments, and bonds; and any other contract might be put under seal, and if that were the case, then took to itself all of the qualities of a sealed instrument. It has seemed to many law students of modern times that the present existence of the law of the seal in modern jurisprudence is without reason and that it should utterly be abolished; as will no doubt be the case in due course of time.

THE PAROL EVIDENCE RULE

There is a rule called the "parol evidence rule" in contracts which should have some discussion in connection with our consideration of the form or evidence of the contract.

Briefly stated, the parol evidence rule is a rule enforced by the courts in the trial of cases by which the effect of a written instrument cannot be changed by evidence of contemporaneous or prior oral agreements altering, adding to or contradicting the writing. The reason of this rule is that the writing is to be considered as having been intended by the parties to be the permanent expression of their contract. The rule does not prevent a contract from being partly oral and partly

in writing where the writing does not purport to be the entire contract, as in case of a promissory note given as a part of a contract otherwise oral. In such a case the written part could not be added to, altered or contradicted as a part. If, for instance, the note called for interest at seven per cent it could not be proved that there was an oral agreement that it should be only six per cent.

The rule does not prevent a person from showing that he has been defrauded into signing a contract; or that a contract legal by its terms is in fact for an illegal purpose; nor does it forbid a person showing that the terms used are used in reference to customs and usages.

Example 56 *a*. A buys a refrigerating plant and receives a bill of sale. He claims that the seller orally warranted the refrigerator to do certain work, and that it will not do such work. This evidence is inadmissible as it would alter the terms of the bill of sale. (A could show an *implied* warranty to this effect, if under the circumstances such a warranty would be implied.)

Questions and Problems

(105) Is writing essential to contract?

(106) A requests B, a workman, to work upon A's yard. B works for a month upon the task assigned. Upon what theory does A owe B anything and how much?

(107) What is the case in Example 50? Why is a different result reached than in the case above?

(108) What is the Statute of Frauds and Perjuries? What is its aim and how is that aim attempted to be accomplished? Is the statute (or similar one) in force in our law to-day?

(109) A sells goods to B upon C's oral promise that if B

will not pay for the goods, he, C, will. What defense has C when sued by A?

(110) A orally tells B to let C have goods and charge the bill to B. Is the Statute of Frauds applicable? Why?

(111) State Examples 52 and 53 and show the distinction between them.

(112) A orally agrees to do certain work for B to be finished within eighteen months. A afterwards breaks his contract and is sued by B. He pleads the Statute of Frauds. Is it a good defense? Why?

(113) State Example 56.

(114) A makes an oral contract with B for the sale of $1000 worth of personal property. Afterwards A refuses to carry out his contract and B threatens suit. A thereupon writes B a signed letter in which he substantially sets forth the contract and again states he will not perform it. B sues A. A pleads the Statute of Frauds. Is his defense good?

(115) Is a memorandum in lead pencil sufficient to satisfy the Statute of Frauds?

(116) What is a contract under seal? What in ancient law, and now even, in some states, is its legal effect?

CHAPTER XIV

TRANSFER OF CONTRACT

THE RIGHT OF TRANSFER

CAN one who is an original party to a contract transfer his rights and obligations thereunder to another? This is the question to be answered in the present chapter. We should bear in mind at the outset that when one person contracts with another he takes upon himself obligations towards, and acquires rights with, a person with whom he has chosen to deal. It has repeatedly been declared by the courts that a person may choose with whom he will contract. I may be willing to buy a horse from A and not be willing to buy the same horse from B. Personality, skill, credit, reputation, is everything in contract. If, therefore, one may choose at the outset with whom he will contract, the law will not nullify this principle by permitting a transfer by the party so chosen to another party, with whom the first party has not chosen to deal. It would seem, therefore, on first consideration that assignment of contract would be a forbidden thing in law except with the consent of all concerned. But other considerations appear which qualify the general rule. In the first place, commercial convenience demands that things both tangible and intangible be merchantable as long as no other

stronger rule of public policy prevents, and we are then led to notice that when one is a party to a contract, he may acquire rights thereunder, a transfer of which cannot possibly affect the real contractual status of the parties. Such rights he is therefore allowed to assign without the consent of the other party. We may say, as a conclusion of our thought thus far, that in speaking of assignment of contract, a correct analysis of the situation requires us rather to speak of it as assignment of a right under a contract, or assignment of an obligation under a contract, and that either right or obligation may be assigned if the party from whom the right is owing or to whom the obligation is owing, consents, but that without the consent of the other party, one cannot assign obligations which he owes to another (with some unimportant exceptions we need not notice here) but can assign his rights against another when that assignment does not interfere otherwise with the contractual rights between the parties. Rights to personal services cannot be assigned. The following example will elucidate this paragraph.

Example 57. P employs A at a salary of $100 per month as a salesman. P's obligations to A are to pay his salary and to perform the other terms of the contract. P's rights are to have A's services. A's obligations are to work for P according to the terms of the contract; his right is to receive his salary and such other things as the contract calls for. If A's consent is lacking, P cannot assign to C his obligations towards A, or his right to A's services. If P's consent is lacking, A cannot assign his right to work for P, but he can assign his right to his salary, for it is immaterial to P to whom he pays the salary. The assignment of the salary does not disturb the relationship between P and A.

THE RIGHT OR TITLE OF THE ASSIGNEE

What it consists of. The assignee can take only the title or right of the one from whom he takes his transfer. If, for instance, a right to a salary is assigned, the assignee will take it subject to all the defenses which the employer would have against the employee, prior payment, failure to earn it, set off, or whatever it may be. For, manifestly, the obligations of the contract ought not to be enlarged by the other party's transfer of his rights, inasmuch as the right to assign is not a contemplated object of the parties when the contract is made.

When right or title perfected. The title of an assignee, as between himself and the assignor, is complete at once when the assignment is made, but as against the other party to the contract, there is no right until such party is notified that the assignment has been made; for the obvious reason that he need take no thought of the possibility of assignment until he is given information to that effect.

NEGOTIABLE ASSIGNMENT

If the subject matter of assignment is negotiable paper, the assignment is called negotiation, and that which has been said in this chapter is not applicable. The subject of negotiable paper is treated at length hereafter.

Questions and Problems

(117) Set forth Example 57, explaining in your own words the points and principles involved as applied to the facts therein stated.

(118) A, on July 1st, asks B to loan A money upon A's September salary. He, also, on the same day, borrows money from C

and assigns his October salary. He does not work at all during September, but does work during October, drawing his salary, however, on the first of the month. B and C both present their claims upon A's regular pay day. Has the employer a defense to either claim?

(119) What should C have done in the above case to have protected himself against A's act in anticipating his salary as stated?

CHAPTER XV

DISCHARGE OF CONTRACTS

MEANING OF DISCHARGE

WE have seen how a contract may be formed, and have discussed something of its operation. Having thus come into existence as a binding thing, how may it be discharged? How may the party bound by it cease to be bound? A contract signifies an obligation upon the parties. By discharge of contract we mean the discharge of that obligation.

MEANS OF DISCHARGE

In general. There are a number of ways by which a contract may be discharged. The most obvious and most common is that of performance. It is the only way ordinarily contemplated by the parties. Nevertheless, other modes of discharge arise as we shall note in this chapter.

Discharge by performance. When one enters into a contract he undertakes to do, or to refrain from doing, something definite. He discharges the obligation of his contract by performing it. Thereafter he is no longer under a contractual obligation; what he promised to do, he has done. If sued, he has the defense that he has performed, and if the other party has not performed, he is in a position to sue. This suggests the question

as to whether he always must have performed before he can call upon the other for performance or damages for non-performance, and that question may be answered next.

When one must perform, or tender performance before he can call upon the other for performance. This depends upon the terms and intent of the contract. The obligation of one party to perform a contract or some promise thereof may precede, concur with or be subsequent to the obligation of the other to perform. For this reason we speak of one's performance as being conditional upon the other's performance, and the conditions as being precedent, concurrent and subsequent. The subject will not be clear without illustrations and the following are here given.

Example 58. A agrees to deliver to B a deed to A's real estate upon the payment of the purchase price of $3000; $1000 to be paid in June, $1000 in July and $1000 in August. Here B's payment of the first $1000 is independent of anything to be done by A, likewise his payment of the second $1000, but upon his payment of the third he is entitled to his deed, and need not pay it, unless concurrently with such payment he receives the deed. If B were sued for not paying he could show that he made a *tender* of the money and requested the deed, and that delivery thereof was refused. Here is an example of discharge of obligation by *tender*. Whenever two things are to be concurrently done, the one in return for the other, tender is sufficient if the other will not perform his part. The law would not compel the seller to part with his deed until he got full payment, nor compel the buyer to pay the money unless he got his deed, although he could be sued for two monthly payments according to his contract, with nothing done on the seller's part.

Example 59. A agrees to work for B for one

month at a salary of $100, payable at the end of the month. A's entire month's services are to be performed before B's obligation of payment arises.

Discharge by impossibility of performance. If performance of a contract is impossible will that fact discharge the obligation? We cannot say yes or no to that question as it stands, but must qualify it. Undoubtedly in some contracts the impossibility of performing it is within the intention of the parties as a fact to discharge the obligation. But in some cases one contracts to do a thing whether he can or not; if he cannot, he must pay damages.

Example 60. A agrees to mine for B 100,000 tons of coal per year out of a certain mine belonging to B. Seventy thousand tons are produced and the mine is exhausted. The impossibility of producing 100,000 tons discharges the obligation to do so.

Example 61. A agrees to furnish bolts for B by a certain time. A's factory burns down and he finds it impossible to perform. A is not discharged unless it is so provided in the contract.

Example 62. W agreed with H that he would find a purchaser within a year for a certain tract of real estate at $30 per acre. He does not find such purchaser and H sues. He defends that it was impossible to find such purchaser. The defense is not good. His undertaking was absolute.

Substantial performance. While it is generally true that one must literally perform his contracts in order to discharge his obligation, a doctrine has been established that in contracts involving considerable detail, a substantial performance made in good faith will be sufficient to discharge the contractual obligation and

thus give one either a right to sue upon the contract and recover upon its terms, or a defense against a suit for damages on account of breach, although an adjustment on account of the immaterial departure may be required.

Breach of contract. If a contract is not at least substantially performed, or is not performed at all, then there is a breach of the contract, unless some lack of performance was brought about by the other's fault or has been waived. Thereafter the party breaking the contract can neither sue thereupon for damages, nor successfully defend against a suit for damages by the other party. It is true that where one does not even substantially perform, yet, without willful disregard of the other's rights, does confer some benefit upon him not given back, a suit may be maintained for the actual benefit to the other party, taking into consideration his damages. Such a suit is not upon the contract, but merely for the reasonable value of the benefits conferred, and constitutes another example of quasi-contract or contract implied in law.

Discharge by agreement. Another means of discharging a contract between the parties is by agreement. The entire contract may thus be terminated or any of its terms changed.

Discharge by alteration of written agreement. If one party to a written contract, without the other party's consent, alters any material term of the document, he precludes himself from a suit thereupon. This doctrine is usually applied to suits upon bonds, notes and other formal papers. One must be very careful to let a written document stand as it has been delivered to him.

Discharge by bankruptcy. Bankruptcy laws are passed to provide for the discharge of an insolvent person from his debts upon his compliance with the law in good faith and the surrender of his property for the benefit of his creditors. Insolvency laws, as distinguished from bankruptcy laws, do not always discharge from debt except with the consent of the creditors. The various states of the Union have the power to enact insolvency and bankruptcy laws, provided the federal government has no law upon the subject in force. When there is such a federal law the state laws are suspended.

There is now a federal bankruptcy law in force known as the Bankruptcy Act of 1898, with several amendments. Under this Bankruptcy Act any person may, for the relief of his insolvency, apply for a discharge of his debts and creditors may apply to have an insolvent debtor made a bankrupt. If the debtor applies the proceeding is called voluntary bankruptcy; if the creditor applies the proceeding is called involuntary bankruptcy.

Any person owing debts may file a petition to be adjudged a bankrupt. But a person must owe $1000 or upwards to be adjudged an involuntary bankrupt.

After the petition is filed, *adjudication* by the court that the debtor is a bankrupt follows unless the debtor contests. If he does contest, adjudication will follow in case he loses the contest, otherwise the proceedings will be dismissed.

In the administration of the estate, a *trustee* is appointed to take title to the bankrupt's property and take possession and charge thereof for the benefit of creditors.

Prior to his appointment, a *receiver* may be appointed as a temporary officer to take charge of the estate pending the election of the trustee, but only in cases where his appointment is absolutely necessary for the preservation of the estate.

The creditors present their claims and the assets are proportionably divided among them and paid as *dividends*. If the bankrupt is afterwards allowed his discharge, the amount of dividend received by a creditor constitutes the full amount to be received by him for his debt.

The bankrupt must apply for his *discharge* in bankruptcy. It is this discharge which is of the utmost importance to him, for without it he will be still liable for his debts except in so far as they are paid by the dividends. A bankrupt will be refused a discharge if any creditor objects and it appears that the debtor has committed certain offenses specified in the Bankruptcy Act, such as having concealed, or destroyed, or refused to keep books with the intent of concealing his financial condition, refusing to answer any material question put by the court, etc.

Claims which are *secured* are not discharged in bankruptcy, as the purpose in taking a mortgage or other lien on property is to guard against the results of insolvency.

Discharge by statute of limitations. If one person claims a right to sue another, he ought to assert that right within a reasonable time after it accrues, while the evidence is fairly fresh in the minds of the parties and the witnesses. Accordingly the law has said that if a person is sued after a passage of a certain length of

time named in the law he may plead that fact as a defense to the proceeding and need not go into the merits of the controversy. The limitation named by the law differs in different states and also differs according to the nature of the liability. As an illustration, the time given to sue for a tort damage may be two years, upon an oral contract, five years, upon a written contract, ten years.

Admission in writing of liability, payment of part of debt or interest after the right to sue has accrued, will extend the time. It will begin to run again from the time of such admission or payment.

The statute does not bar the suit unless it is relied upon. A defendant may want to defend on the merits notwithstanding he has a right to the technical defense of the statute.

Example 63. A sues B upon a note dated July 1, 1901, and due July 1, 1902. B paid interest on this note up to 1907. He then stopped payments. A sues July 1, 1918. The statute of the state requires suit to be brought upon notes within ten years. B pleads this statute. The defense terminates the suit. Whether B owes the money cannot be gone into. A should have asserted his right by starting suit before the time expired. If the suit had been started in 1916, the statute would not have run.

Questions and Problems

(120) What is the meaning of the word "discharge" in contract law?

(121) What is the most obvious method of discharge?

(122) A agrees to sell B potatoes on 90 days' credit. B accepts. When the time for delivery comes A tenders the potatoes and

demands cash. B refuses to accept on those terms and sues A for his loss of profits. Can B recover? Why?

(123) Discuss Example 58.

(124) A agrees to work for B for one year. B dies within a month and B's business is closed to be wound up. A sues B's estate for breach of contract. Can he recover? Why?

(125) A agrees to manufacture for B 1000 spark plugs of a certain design and kind. A has a strike which makes it impossible for him to comply. B sues A. Has A a defense?

(126) Name other modes of discharge.

(127) B owes debt of $10,000. He has assets worth $5000. His creditors are X, Y and Z. X has a mortgage on B's home. Y and Z have no security. B files a petition in bankruptcy under the Federal Bankruptcy Law of 1898. How much in that proceeding can Y and Z collect (not in exact figures but general explanation)? Will X be affected by the proceeding? What must B do afterwards to prevent Y and Z suing him for the balance? Can Y and Z under any circumstances defeat the discharge of B's debts?

(128) Who is the trustee in bankruptcy?

(129) What two kinds of bankruptcy proceedings are there?

(130) Describe the purpose of the Statute of Limitations.

PART III

PRINCIPAL AND AGENT

CHAPTER XVI

DEFINITIONS AND EXPLANATIONS

GENERAL PRINCIPLES

One may act through another. A person may do an act personally, or through another whom he has appointed to do it. In either case it is by logic and by law the first person's act. He is therefore held responsible. The act is deemed to be his and not the act of the person through whom he does it (except in the case of torts and crimes, in which every participator, principal or agent, is held to answer).

> **Example 64.** B appoints A to buy goods for him, pledging B's credit therefor. A, pursuant to instruction, buys the goods in B's name. The act is B's act. He can be sued for the price and A cannot be sued.

Agent: a person under another's authority. One may in one sense do work for another and yet not be that other's agent. Thus I may order a tailor to make me a suit of clothes. He is not my agent or my servant. He is simply one with whom I have a contract and is no more my agent or servant than I am his. He, therefore, may hire employees and he may send a man to the whole-

sale cloth dealer to buy cloth for him and in his name with which to make the suit of clothes. The employee is an agent or servant of the tailor. The representative sent to buy the cloth is an agent of the tailor. They *work for* the tailor. Their time is at his disposal, or at least, they are subject to his instructions and authority. They are *under* him. We see, therefore, the nature of agency. The agent is working *for* the principal — representing him. The tailor merely contracts with me for *results*. He in no way purports to work for me or to represent me.

We may think of an agent as a *delegate*. If a delegate is chosen to go to some assembly, he goes as a representative of others. He acts for his constituency. An agent or servant is one to whom duty has been delegated.

Maxims governing subject. Two legal maxims often made use of to describe the relation of principal and agent or master and servant are: "*qui facit per alium qui facit per se*" (he acts, himself, who acts through another); and "*respondeat superior*" (let the superior answer).

Difference between agent and servant. The person who works for another in the sense we have just mentioned, that is, the person who puts his services at the disposition of another, may be either *agent* or *servant*. An agent is one whose work for another involves authority to represent the other with other persons in contractual transactions; a servant is one whose work for another does not involve such authority. When we speak of an agent, we call his employer a *principal;* when we speak of a servant, we call his employer a *master*.

Example 65. B employs A and S to work for him. He instructs A that it will be A's duty to sell goods and collect money. S's duty will be that of acting as B's chauffeur. A is an agent; S, a servant.

From the illustration we may see that while the consequences of one appointment are quite different from those of the other, the relationship between employer and employed is basically the same in both cases. Each is employed to work for B, and it happens that A's work requires him to deal with others on B's behalf. S's work does not require this. A's duty is to make contracts; S's duty does not require him to make contracts. But both are employees. Both occupy the same legal relation toward B, but their work is of a different nature. Because of the difference in nature of the work, important results arise. A has the power to bind B upon contracts with third persons; S has no such power. But it is readily seen that the same employee may be at times an agent and at times a servant. The agent to sell and collect may have to take care of the goods or store; the chauffeur may be empowered to rent garage space, buy gasoline and oil, contract for repairs. This shows how the work of an agent and of a servant is essentially the same; it is only in the consequences that agency and service differ. But those consequences are very important. On account of those consequences we have the contractual rights of third persons involved in agency; the obligation of the third person toward the principal. Between master and servant we have no such rights involved. The only way in which a third person may be affected in this case is by the torts of the servant — to what extent is the master responsible therefor?

DIFFERENT KINDS OF AGENTS

General and special agents. Agents are called *general agents* by the courts when their authority is of a general continuing sort involving a line of action; they are called *special* when they are given a specific thing to do, their authority ceasing with its performance.

> **Example 66.** B employs A to take charge of B's office as manager. He employs C to collect a debt owing by M. A is general agent; C is a special agent. The difference between the two agencies lies in the fact that the authority by implication or by appearance is much greater in the first case than in the second. A general agent is necessarily given considerable apparent and implied authority. Having general charge of a line of business he may be supposed to have all the authority that usually goes with such appointment. A special agent's powers are very narrow. He can only do that particular thing he is appointed to do. Perhaps A could extend credit, compromise debts, extend time of payment (depending on all the circumstances) without having been actually told he could do these specific things, for they might all be comprehended by implication, or at least apparently to third persons, within and from his general appointment. But C could collect only. He could not grant extension or do any other thing than the particular power given. And the debtor should be sure that C has the power he claims to have. He should demand a letter from B showing C's right.

Professional agents. Professional agents are those who represent various principals in some particular line of action professionally, as lawyers, brokers and factors.

A *lawyer* is one who professes to be skilled in the practice of representing those who employ him in matters involving lawsuits or particular knowledge of law.

A *broker* is one who gives his services to bring buyers and sellers together. He does not usually have any possession of the property for the sale or purchase of which he is agent. His authority is generally a question of fact in each case for he often does not have any authority to make terms, but what his real authority is depends upon the facts. A broker usually works upon a commission. There are many classes of brokers, the most important of which are the real estate brokers, stock brokers and merchandise brokers. Merchandise brokers are usually brokers in some particular line, as sugar brokers, cotton brokers and the like.

A *factor* is an agent who represents buyers and sellers who may choose to employ him, and differs from a broker largely in the fact that he takes possession of the property sold by him and often contracts in his own name, his principal being undisclosed. On account of the fact that he is in possession of the property and may deal with it as his own, his authority is quite extensive. The customs of business recognize that his authority is large. One may deal with him as having authority to sell goods in his possession much as if he were the owner of those goods, except that he must conform to usual customs in making terms and granting credit.

WHO MAY BE PRINCIPAL OR AGENT

Who may be principal. Whether one may appoint an agent to do an act depends upon his ability to do the thing in person. If he has the legal power to do an act, he may appoint an agent to do it for him.

Who may be agent. Any one who has enough intelligence to carry communication between his prin-

cipal and the third person may be an agent. It is not necessary that he have the power to do the act himself. Thus married women, who at common law could not contract at all, could act as agents. It is a very common thing for a person under age to act as agent. He can quit his place at any time without liability, but acts done by him while he acts as agent, are just as effective in binding his principal as though he were of age.

Questions and Problems

(131) B entered into a contract with A, a merchant tailor, by which A was to make a suit of clothes for B. A employed M, a journeyman tailor, to work in his shop for eight hours a day and put him at the task of making B's suit. B upon ordering the suit paid A $25 as part payment. A gave $10 of this to M to take to X, a merchant, for the purchase of some cloth with which to make the suit. M got the cloth on A's credit and secretly pocketed the money. When the suit was finished and before B accepted it, A sold it to Z, and refused to make B another suit or refund his money. B brings suit against Z to recover the clothes. He also has embezzlement proceedings instituted against A. X sues A for the price of the cloth bought by M. How will these cases terminate? Why? Is A B's agent or servant? Is M an agent or servant? Discuss fully.

(132) Why is a difference made in the cases between a general agent and a special agent?

(133) Name some special classes of agents. Define a broker. Name some kinds. Define a factor and state his authority.

(134) Who may be principal? Who agent?

CHAPTER XVII

THE AGENT'S AUTHORITY IN CONTRACT

ACTUAL AND APPARENT AUTHORITY

Power of agent to bind principal must be traced back to something said or done by principal. A person claiming to be an agent cannot bind any other person for whom he purports to act unless authority has either been actually or apparently conferred upon the agent by something said or done by the alleged principal. This underlying rule must always be borne in mind. We must remember that the basis of the agent's power to bind another person must consist in that other person's words or acts. Those other words or acts may either *actually* give authority or seem to do so. One who seeks to hold an alleged principal upon a contract made by one who is claimed to have been that alleged principal's agent must show that the principal (1) *actually* conferred the authority to do the act; or (2) did or said something from which the agent apparently had the power to do the act in question.

Example 67. A makes a contract by which he purports to bind B to sell certain goods to C. C calls upon B to perform the contract. B denies that A had the authority to make such a contract. The burden is upon C to show that B actually gave A the authority to sell such goods to C, or to show that B had said or done some-

> thing from which C had the right as a reasonable man to believe, and from which C did believe, that A had the authority to do the act in question.

The reason for this rule is very clear. Suppose that M establishes a dry goods store and employs A to go about collecting debts and does not employ B at all. A goes about in the community *borrowing money* and stating that M will repay. After collecting a considerable sum, he absconds. B also goes about claiming to have authority to collect debts. He, also, absconds with what he is able to collect. Now it would be not only manifest injustice to make M responsible for the acts of these persons in pretending to represent him, but would make all fortunes precarious. Any person by merely claiming to be an agent, or any agent by acting in excess of his power, would be able to ruin any other person for whom he pretended to act. And the principle not only applies to cases of intended wrongs. It applies also to acts in excess of authority honestly done. As where in the case supposed A borrows money and then loses it, or offers it to M and M will not accept it.

If, then, we will remember throughout this discussion of the subject of agency that the power of an agent to represent another in the performance of a contractual act depends on something said or done by the principal as the basis for that which the agent says, or does, our conception of the subject will be clear.

Apparent authority. The third person need only rely upon apparent authority, no matter what the real authority is, but we must not understand this to mean that the apparent authority is necessarily any different from the real authority. In cases of special agents the

real authority and the apparent authority usually coincide. Even in broader agencies, where the agent has to be given a good deal of discretion, the real authority and the apparent authority may be the same. If I put a man in charge of my office, I not only give him apparent authority to do a great number of acts incidental to the management which I do not and could not specifically mention, but by implication I give him actual authority to do those things. I might, however, secretly limit his real authority. I might put him behind a counter and yet instruct him to receive no money. Here his apparent authority would be wider than that of his real authority and his receipt of money for goods sold over the counter would constitute payment by the customer whether he ever gave me the money or not, for he acts in the exercise of the authority which *by my act* I have apparently conferred upon him. It is still traceable back to what I have done by which I have given him apparent power. The same could be true of a special agency, as, for instance, if I should write a letter giving A the power to collect a certain debt for me and then orally instruct him not to use the letter until I notified him further.

Authority in general and special agencies. We have already said something upon this subject. But something further remains to be said. In the general agency we find much that must be implied and therefore in any particular case is to be considered as apparent to the third person even where it has been in that case secretly forbidden. We therefore say that the more general the agency, the greater the appearance of authority while in the special agency there is little ap-

parent authority. But, after all, the test is simply this: From what the principal has apparently said or done what power has the agent? If he has given him charge of a line of action, he has apparently clothed him with that which would usually be implied under those circumstances. If he has appointed him to do a particular act, he has not apparently clothed him with much that is in addition to that specifically set forth.

A general agent is not one merely because he is called such. It depends upon the power actually conferred. In one case a person leaving a state gave another the authority to collect debts, stating in a general way that the man was his general agent to transact business within the state. The court held that the authority of the agent was limited to the collection of debts. A special agent is still such although he acts repeatedly if for each act he must have special authority.

APPARENT AND IMPLIED AUTHORITY

Apparent authority to sell personal property. Whether an agent has apparent power to sell personal property belonging to his principal depends upon the power which the principal has given him to deal with personal property. *Mere possession* of personal property does not give the agent ostensible power to sell it.

> **Example 68.** B has a delivery wagon which he desires to have fixed. He sends it to the wagon maker for that purpose. The wagon maker has no apparent power to sell it from the mere fact that B gives him possession.
>
> **Example 69.** B employs A as a traveling salesman, providing him with a sample case and samples. A sells them. The purchaser will not get a good title and B can take his property.

The same rule governs even in cases where the bailee is a second-hand dealer in goods of the kind in question.

> **Example 70.** B has a watch which he takes to A, a watchmaker, for repairs. A, who deals in new and second-hand watches, sells B's watch to a customer. B can obtain the watch from the customer, who must look to A for a return of his money.

These illustrations show that an agent will not have apparent authority to sell personal property from the mere fact that he has possession. But any person put in a position from which a reasonable man would imply a power to sell can convey title to one relying on the appearance, even if his power was secretly limited by the principal.

Apparent authority to collect. The authority to collect money is an authority not readily implied. A debtor could not usually rely upon a payment made to an alleged agent unless that agent had the specifically expressed authority to make the collection in question. It has been said that in cases of sales of personal property an agent will have apparent authority to collect in two classes of circumstances: (1) where he, himself, sells the goods and is empowered to make delivery thereof, and (2) where though he does not sell and make delivery, he is " behind the counter," that is to say, placed in a position in which it would reasonably appear that it was meant for him to collect money.

Apparent authority to warrant goods sold. This is a question which has caused difference of opinion. The better view possibly is that any agent having power to sell goods has apparently the power to make the usual warranties on behalf of the principal.

Apparent authority to buy goods on credit. If one has authority to buy goods, may the other party assume that he can buy on credit? This would depend altogether upon the circumstances and the terms of the appointment. One authorized to buy goods and not supplied with cash for buying them would have inferentially the power to buy on credit. Even if supplied with cash and told not to buy on credit, he might still have that power if the principal allowed him to seem to have such power from his way of carrying on business on the terms of his authority.

Apparent authority to sell on credit. This depends altogether upon the circumstances of the case involved. This much can be said, that from the mere authority to sell, there could be no inference justly drawn that there was the power to sell on credit. But, after all, the third person buying on credit would run little risk, as not having paid for the goods, the question would usually be from his standpoint, merely whether he could insist on the period of credit.

Apparent power to borrow money. The apparent power to borrow money is very limited. The courts say that the power to borrow money, being the most dangerous power an agent can possess, will not be implied, unless it is absolutely essential to the execution of the express purposes of the agency. But it is a difficult thing to find cases in the law books in which the court has found such implied power to exist. One is never safe in lending money to an agent upon the credit and for the use of the principal unless he has the word of the principal for it that the agent has the power. Of course if the principal receives the money or the

benefit of it from the agent, he will be liable upon the theory of ratification, hereafter discussed.

Apparent power of agent to give, indorse, accept or receive negotiable paper. The power of the agent so to act depends altogether upon the power expressly conferred upon him so to act or to do those things which by implication require the making or taking of negotiable paper as a reasonable means of carrying out the other power. For instance, an agent empowered to borrow money would have the implied power to give the usual evidences of the debt; an agent empowered to buy goods would have the power to accept a draft upon his principal for the purchase price.

Questions and Problems

(135) M claims that P is liable upon a contract made by A in P's name. What must M show?

(136) P conferred upon A power to manage P's real estate and execute deeds and mortgages and the necessary notes to accompany the mortgages and pay taxes "and generally to act in the premises as fully as I may act personally." A borrowed money from M in P's name for the purpose of paying taxes. He used the money for himself. M sues P. Can M recover? (William *v.* Dugan, 217 Mass. 256, L. R. A., 1916, C 110.)

(137) A, an agent to solicit advertising and collect accounts, collected notes payable to his principal and had them cashed at the T Bank, and absconded. P sues the bank. Can he recover? (Dispatch Printing Co. *v.* Nat. Bank of Commerce, 109 Minn. 440.)

(138) A takes a book to B, a second-hand book dealer, and asks a price. B says that he will examine it and notify A what he will give him. A leaves the book and B thereupon sells to C, an innocent purchaser. A sues C for the book. C claims that by leaving the book with B, A gave him apparent ownership or power to sell it. What result?

(139) What is a general agent? A special agent?

CHAPTER XVIII

RATIFICATION; UNDISCLOSED AGENCY

RATIFICATION

Ratification defined. Suppose that one in acting as agent for another has no authority or exceeds his actual or apparent authority; yet, nevertheless, the putative principal, hearing of the act and understanding its nature, affirms what has been done in his behalf either by his conduct in receiving the benefits, not disclaiming when justice would require him to do so, or expressly stating that he affirms the act. Clearly in that case the lack of previous authority is supplied by the subsequent affirmation. The act of supplying previous authority is called *ratification*.

Act must have been done ostensibly as agent. A person will not be held responsible by ratification unless the act was done apparently for him.

> **Example 71.** C sells goods to A who buys in his own name. B afterwards agrees with A to take the goods and does take them and gets the benefit of the contract. C sues B on the theory that B has taken the benefit of A's contract. B is not liable to C. Had A really had power to buy for B, C could have held B as *undisclosed principal*, for there would have been a real agency at the time of the act. Ratification implies a *lack* of authority. If there is authority, we do not need to rely on ratification.

Ratification by word or act. A person may ratify the agent's act by expressly asserting that he will be responsible or by act. *Receipt of benefit* is the most frequent manner of ratification. One cannot enjoy the benefit of a contract made nominally in his behalf and still disclaim liability thereupon.

> **Example 72.** P accepts goods bought by A as P's agent from B. A had no authority. B sues P. P is bound, although in words he may repudiate what A has done for him.

Ratification must be of whole of act. The principal cannot ratify a part of the act and not the rest. He must take the act with its burdens as well as its benefits. Therefore, if he ratifies part, he will be deemed to have ratified the entire act.

> **Example 73.** A, without authority, sells and delivers coal as B's agent and servant. In the delivery he negligently breaks a window. B learning of A's act sends the customer a bill, at the time knowing of the tort. He is responsible for the broken window. He must take the act in its entirety or repudiate it altogether.

UNDISCLOSED AGENCY

If an agent, in the execution of the act which he is authorized to perform, does not disclose the fact or the identity of his principal, the principal may, if he becomes afterwards disclosed, be held upon the theory that he is the real party in interest — the real contracting party. There are some exceptions to this rule that a disclosed principal may be held if the third party chooses to hold him. The two most important are that he cannot be held upon commercial paper made and executed by the agent as principal, and that the right of the third person

to hold the principal is subject to the state of accounts between the principal and agent at the time the third person elects to hold the formerly undisclosed, but now known, principal.

As the undisclosed principal may be held so may an undisclosed principal elect to hold the third person, but this rule is also subject to exceptions, the three most important of which are: (1) the exception based upon the rule of negotiable paper that no one can be held thereupon except a party thereto; (2) the state of accounts between principal and agent; and (3) the rule of contract law that one person cannot be made a party to a contract with a person with whom he has not chosen to contract. The undisclosed principal may sue the third person therefore only in respect to those rights which the agent could have assigned to the principal without the consent of the third person.

Questions and Problems

(140) Define ratification.

(141) What is essential to ratification?

(142) A gives B power to borrow money for A. B in order to get the money mortgages A's personal property to C. A, knowing of the facts, takes and uses the money. C attempts to enforce the mortgage but A attacks its validity on the ground that B had no authority to make it. Will he win? Why?

(143) Who is an "undisclosed principal"? May he be sued if discovered? Why? May he disclose himself and sue the other party to the contract?

CHAPTER XIX

THE PRINCIPAL'S LIABILITY FOR THE AGENT'S OR SERVANT'S TORTS

Principal responsible for agent's torts. It is a well-established rule of law which is the foundation of a very large percentage of our lawsuits to-day that a principal or master is liable for those torts of the agent or servant which are committed within the scope of the employment, although committed, as is usually the case, without the consent and against the wishes of the employer. The reader has undoubtedly observed or known of cases in which this rule has been applied. For example, it is a familiar occurrence in our law courts to have a successful suit for damages against a street car company arising out of the negligence of an employee in operating a street car. And not only for torts of negligence, but for all classes of torts, a master or principal is liable, provided they are committed within the scope of the employment, that is, can justly be said to be a part of the act done. And the reason is that as the authorized act of the agent or servant is deemed in law to be the act of the principal or master, he must assume the responsibility for the manner in which it is done, for, in the person of his agent or servant he, himself, is deemed to be there doing the act.

When tort is within the scope of employment. The employer is not liable for all of the torts of his agent or

servant. For what torts is he liable? Clearly they must be associated with the service. They must constitute a part of the act done for the employer. The servant or agent at the time he commits the tort must be "about his master's business." The tort complained of may be no part of the act done in behalf of the employer for one of three reasons:

(1) Because the agent or servant is not at the time on duty.

(2) Because the tort of the agent or servant, though committed while on duty, cannot be properly considered a part of the act done for the master.

(3) Because the agent or servant although supposed to be on duty has made a departure for a purpose of his own.

Let us consider each of these.

The agent or servant not on duty at time he commits tort. I cannot hold a person for the tort of another merely because that other is an employer of the person sought to be held.

> **Example 74.** A is employed by the B Company. He is guilty of negligence while going home from work, whereby C is injured. Clearly the B Company has no responsibility for this act.

When is tort committed while on duty to be considered within scope of employment or of authority? This is a question sometimes difficult to answer. In other cases the answer is very simple. The most numerous torts for which masters are sought to be held liable by third persons are those of negligence. Whenever a servant does his work negligently, whereby a third person is injured, the principal is responsible if the third person was not also negligent at the time.

Example 75. A, motorman for the B Railway Co., negligently drives his car into a vehicle driven by C and injures the vehicle and C. C can have his damages unless C was negligent and his negligence contributed to the injury.

If the tort is a willful tort, it becomes more difficult to identify it as within the scope of the act. Clearly it must in some way be a furtherance of the act done for the master or principal.

Example 76. A bricklayer, employed by B, while on duty hurls a brick at and strikes C, a passer-by against whom he holds enmity. B is not liable. The tort cannot be considered in any way as part of the act done.

If the tort can reasonably be considered a part of the act authorized to be done, no matter how far its manner of performance may be from the desires of the master or principal, the master or principal is liable for damages arising out of the injuries thereby caused to third persons.

Example 77. A is a detective for the B Department Store. Suspecting that C has been guilty of shoplifting, he has her arrested. C is really innocent and the charge fails. A also had no reasonable grounds justifying his belief. The store is liable for damages to C.

Example 78. In the same case, assume that a window washer makes the arrest. The store would not be liable as the act would clearly be outside the scope of his employment.

Example 79. B employs A to sell goods. A in making the sale makes fraudulent representations. B is liable for the damages thereby caused the purchaser.

We see, therefore, that whether a tort is within the scope of the servant's duty or of the agent's authority depends upon its part in the act which is done for the employer.

Where servant makes departure for a purpose of his own. If a servant, although within his hours of service, departs from the work for a purpose of his own, or, as one judge has said, goes upon "a frolic of his own," the master will not be liable in cases in which he would have been liable had there been no such departure, but merely going a longer way around while engaged upon the master's business when the tort is committed will not excuse the master.

Questions and Problems

(144) If a servant or agent commits a tort without his employer's consent, is the employer liable? When? Why?

(145) State Example 74. Why is the master not liable in that case?

(146) A left home with the intention of going to R's store to trade. Before she entered the store and while she was standing looking into a shop window, a detective employed by the company caused her arrest, accusing her of shoplifting. Is R liable? (Vrohotka *v.* Rothschild, 100 Ill. Ap. 268.)

(147) A is agent for the P Insurance Co. with authority to suspend, check up, and settle with, the local agents of the company. B, one of such local agents, was deemed to be in default. A attempted in various ways to induce B to settle up and finally had him indicted for embezzlement, a crime for which he was found not guilty. Assuming that A acted without reasonable grounds, is P liable? (Russell *v.* Palatine Ins. Co., Miss. 31, L. R. A. N. S. 470.)

(148) A is P's chauffeur and it is his duty to care for his master's automobile and drive his master day or night when called upon. On a certain evening he takes the car out to give a friend of his a ride. He drives negligently and runs over and injures M, who is crossing the street. Is P liable to M for damages?

CHAPTER XX

THE AGENT OR SERVANT'S LIABILITY TO THIRD PERSONS

Liability in contract. The agent is not liable to third persons upon contracts he makes as agent with such third persons if he acts within the scope of his authority and contracts in his principal's name.

> **Example 80.** P appoints A to contract with C for the sale to C of an automobile. A, pursuant to the authority and in P's name, makes the contract. P afterwards wrongfully refuses to deliver the car. The contract is between P and C. A was a mere intermediary. He has no liability upon the contract.

Agent liable where he misrepresents authority. If an agent by means of misrepresenting his authority exceeds it and makes a contract in his principal's name upon which the principal is not liable and which the principal does not ratify, the agent is liable on the theory that he warrants his authority. But this rule does not apply where the third person knows as much about the authority as the agent does, for in that case he should know as well as the agent should that the contract is in excess of authority.

> **Example 81.** P gives A authority to purchase goods with cash supplied to A for that purpose. A does not have sufficient funds to

purchase certain goods which he believes his principal would like to have, and he borrows money in his principal's name for this purpose. The lender does not inspect A's authority and merely takes A's word for it. P refuses to ratify A's act and repudiates it as being without authority. A is then sued. He can be held. Had C known what A's authority was, he could not hold A as he could not then have relied upon the assertion.

Agent liable when principal undisclosed. If an agent does not disclose his principal when he makes a contract, the agent is liable upon the contract although he did in fact have full power to bind the principal had he chosen to do so. The reason is obvious. If C contracts with A, it would be forcing C into a contract with a person with whom he might not have cared to contract if A afterwards could divest himself of obligation by asserting that he was in reality an agent and therefore ought not to be held.

If a third person upon discovering the identity of the real party in interest chooses to hold him, as the law gives him the right to do, then after such election is made, the agent's liability ceases.

Agent's liability when agent contracts in his own name. Even if the principal is known, there is no law preventing an agent from making a contract in his own name even if he has authority to bind the principal. The third person may not care to take the principal's credit, or the agent may carelessly or for some good reason have himself made a party to the contract as principal, though he is in fact agent. An agent who desires to bind his principal should, in making a written contract, be careful to describe his principal as the con-

tracting party and should sign his principal's name by himself as his agent, thus:

James Sprague
by
Walter T. Jones, Agent.

And in the body of the contract James Sprague should appear as the contracting party.

Liability in tort. All who participate in the commission of a tort are liable. An agent or servant who commits a tort is for this reason liable, therefore, whether it is committed within the scope of his authority or employment or not. If within the scope of his authority the principal will also be liable, but this will not excuse the agent or servant for being the participant in the commission of a tort. In practice where there is a financially responsible principal or master, the agent or servant's liability is frequently ignored. One who has a claim in tort against a railroad company does not, in the majority of cases, assert it against the employee. But this is for practical and not legal reasons.

Questions and Problems

(149) P employs A as salesman. A warrants the goods sold. They turn out defective. The purchaser sues A. A acted within the scope of his authority and in P's name. Is A liable in a suit by the purchaser? Why?

(150) Suppose in the case above, the agent did not have authority to warrant, but by the fact of making the warranty represented that he had. Is he liable? Why?

(151) What is the liability of an agent of an undisclosed principal? What may the third person do whereby he loses his right against the agent?

(152) John Smith, having authority to buy goods for Henry Jones from Peter Moore, which fact is known to the seller, buys

the goods in his own name, giving his own note. Is the agent liable?

(153) Give the proper way for an agent to sign a contract when he desires to bind his principal.

(154) If an agent, acting in behalf of his master, commits a tort, is the agent liable? Why?

CHAPTER XXI

MUTUAL RIGHTS AND OBLIGATIONS OF PRINCIPALS, AGENTS AND SERVANTS

DUTY OF GOOD FAITH

In general. The relationship of the Principal and Agent and of Master and Servant is one of highest trust and confidence. Each must exercise towards the other the greatest degree of good faith in mutual dealings. Some applications of this doctrine are made below.

Agent as buyer from or seller to principal. If an agent is appointed to sell goods he must not sell to himself without the consent and knowledge of the principal. If he is appointed to buy for his principal he must not sell from himself unless the principal consents. The reason is that one who sells will be tempted to buy as cheaply as he can. Now one who appoints an agent to buy or sell for him is entitled to believe that that agent is buying as cheaply and as well for him as he would himself if acting personally, and that one who sells shall sell as dearly and well as he himself would personally. If the agent interposes himself as that buyer or seller, unknown to the principal, there is temptation to betray the trust. It may not actually be betrayed, but the law will not inquire of this, but forbids the temptation itself.

Example 82. P appoints A to sell real property. A without P's knowledge buys the property, representing that he has sold to C. P afterwards discovers the true facts, tenders back the purchase price and asks to have the sale set aside. He will prevail and it is not necessary for him to show that A actually bought for less than he might have obtained.

Contracts between principal and agent. An agent may properly buy from or sell to his principal or make any other contract concerning the subject matter of the agency if he has the principal's consent and provided further he discloses every material fact. Strangers deal " at arm's length " and are each on guard, but as a principal is disarmed when he deals with his agent, he may expect the fullest disclosure of every material fact.

LIABILITY OF MASTER FOR INJURIES TO SERVANT

Common law liability. A master was bound by the common law to provide his servant with a safe place to work, to exercise care toward him for his personal safety and to use reasonable care in the selection of competent fellow servants. But a servant had no case against the master (1) where the injury was not due to some carelessness on the part of the master; (2) where the injury was caused by the negligence of a fellow servant where the master had exercised reasonable care in the selection of that fellow servant; (3) where the injury was caused by the usual risks incident to that kind of employment; and (4) where the injury resulted from the servant's own negligence, even if the master were negligent also.

Statutory liability; employer's liability and compensation acts. Acts have recently been passed in

many states by which employees engaged in hazardous work are to be compensated for injuries received while on duty, regardless of the negligence of employer or employee, or co-employees or assumed risk. These laws establish amounts of compensation based upon the extent of the injury and the age and earning power of the employee.

Questions and Problems

(155) W employed J to sell W's property for $3000, reserving the right to sell himself if he found a purchaser. W entered into negotiations with one H for the sale of the property for $3300, but H learned that the property was offered for $3000 by J, whereupon he dropped his negotiations with W and dealt with J. J, by a roundabout method, sold to H. W now sues for $100 commission retained by J, on the ground of breach of faith. Can W recover? (James *v.* Williams, Neb. 20 L. R. A. 207.)

(156) A employed B to purchase property for her for $5000. B negotiated with the owner and found he could purchase for $4500. B thereupon bought it himself. A, learning of this, brings suit to have the court declare the property to be hers. Will she prevail? Why?

(157) D was manager of a theater for H. H had a ten-year lease. Before the lease expired D secretly applied to the owner of the building for a renewal of the lease at an increased rental. H claims the benefit of this lease. Is he entitled to it? (Davis *v.* Hamlin, 108 Ill. 39; Essex Trust Co. *v.* Enright, 214 Mass. 507, 47 L. R. A. N. S. 567.)

(158) What is the liability of the master for the servant's injuries under the common law rule and under liability statutes?

CHAPTER XXII

REVOCATION AND TERMINATION OF AGENCY

REVOCATION

Right and power to revoke distinguished. An agent's authority may be revoked (except in cases noted under next heading) regardless of the right to revoke. If the right to revoke exists by reason of the wrongdoing of the agent, or a reservation of right in the contract, or an agency without definite duration, then the power to revoke and the right to revoke coincide. But in cases where there is no *right* to revoke, there exists the *power* which, if exercised, would give the wrongfully discharged agent a suit for damages.

> **Example 83.** P employs A for one year as his agent, conferring upon him authority for certain purposes. One month later P wrongfully discharges A and revokes his authority. The authority of the agent is gone and he cannot by any means retain it either with or without court procedure. But he would have a right to sue P for damages for the wrongful act.

Agencies coupled with interest. If an agency is " coupled with an interest " it cannot be revoked. An agency is coupled with an interest when the agent has a sort of lien upon or title in the subject matter of the agency. But an agency is not coupled with an interest merely because it is profitable to the agent.

Example 84. P appoints A as his agent to sell real estate. The contract is a very good one for A and he is making much profit thereby. P can revoke this agency, though it may be wrong for him to do so, depending on his contract. If wrong, A may sue for damages, but cannot prevent the revocation.

Example 85. P borrows money from A and as security authorizes A to collect the rents from P's property. This agency is coupled with an interest and cannot be revoked. Either P or A's death will not revoke it.

TERMINATION OF AGENCIES BY OTHER MEANS

Termination by lapse of time or exercise of the authority. When the time has elapsed for which the agent has been appointed, or he has carried out his authority, obviously his agency ceases. However, agencies are frequently for indefinite periods, and notice by agent or principal would in that case terminate the agency. Where an agency terminates by lapse of time, notice to third persons may be desirable, as hereafter explained.

Termination by insanity or death of principal or agent. The death of either principal or agent will terminate the agency, except where coupled with an interest. Insanity of either will also operate in the same manner.

Notice to third persons where agency terminated. Where an agent has been in charge of some line for a period of time, the cessation of his authority will not affect third persons who have not learned thereof, where the agent continues to perform acts of apparent agency. It is advisable, therefore, to see that notice is given to those who have dealt with the agent prior to the time his authority ceases. Frequently, his quitting is necessarily accompanied by a change in circumstances

which would themselves serve notice that he was no longer connected with his former principal.

Questions and Problems

(159) Is there a power to revoke an agency when there is no right to revoke? Why?

(160) When is an agency coupled with an interest? State Example 85.

(161) In what other ways may agency be terminated?

PART IV

SALES OF GOODS

CHAPTER XXIII

DEFINITIONS AND EXPLANATIONS

SALE DEFINED

"Sales of goods" as a subdivision of law. The law of Sales of Goods is that division of law which covers those contracts by which one person intends the transfer of the ownership of personal property from himself to another. The subject is often designated merely by the word "Sales," which, when used as a title for a subdivision of law, means sales of *goods* or *personal property*. We also speak, it is true, of the sale of *real property*, and correctly so, but "Sales" as a short title of a branch of law is always taken to refer to personal property.

Sale defined. A sale is defined by the Uniform Sales Act as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." (Uniform Sales Act, Sec. 1.)

It will be observed that the definition implies the actual transfer of ownership. There may be a contract to make a sale which is never consummated, in which the ownership is not transferred; and such contracts obviously also belong to the subject of sales. The word

" sale " is thus used in a narrow sense to indicate a transaction in which ownership does actually pass, and in a broader sense to include also contracts to sell which may be for some reason not carried out.

Title, ownership, property, possession. The words " ownership " and " title " in the law of sales are for our purposes synonymous. The reader knows from the use of the word in common speech what is meant by " owning " property. The law of sales treats of the transfer of this ownership from one person to another. The word " title " is often used in the same sense. We speak of the title being in A, or passing from A to B. But we also use the word " title," and sometimes also the word " ownership " to indicate a special right to hold property as distinguished from general ownership or title as where we say " A's title is that of bailee."

The word " property " is used synonymously with ownership but more usually to describe the thing transferred, as where we say, " the horse was A's property."

SALES DISTINGUISHED FROM OTHER TRANSACTIONS

Sales and bailments distinguished. When one parts with the possession of goods to another under a contract it is important to determine whether ownership passes to that other with the possession, thereby constituting a sale, or whether the deliverer retains his ownership, and thereby constitutes the other party a *bailee.*

A bailment exists whenever the person who has the possession of goods must return to the other the *same* goods as those received by him, either in the same or altered form, or disposes of them as the agent of the other person.

Example 86. A, a wholesale carriage manufacturer, contracts with B whereby B is to have the agency for A's carriages. A sends a lot of carriages to B under this arrangement, B to have the privilege of returning all that are unsold. When about half have been sold, B goes into bankruptcy. His trustee in bankruptcy claims the carriages as belonging to B. A claims them as owner. The goods belong to A and may be reclaimed by him. (Franklyn *v.* Stoughton Wagon Co., 168 Fed. 857.)

Example 87. A delivers to B six sheep under an agreement whereby B is to return to A the same sheep or sheep of equal value. B's creditors seize the sheep. A starts legal proceedings to get possession of the sheep from the creditors. A will fail as the title to the sheep passed to B when the sheep were delivered to B as B could perform his contract by delivering the same sheep or other sheep. (Wilson *v.* Finney, 13 Johns (N. Y.) 358.)

Sales and gifts distinguished. A gift is a transfer of personal property gratuitously. A sale is supported by a consideration (called a "price"). An agreement to make a gift is unenforceable. It lacks the element of contract known as consideration. Title passes by gift, but the gift must be completed by *delivery* of the thing given. In a sale, title *may* pass before delivery.

Example 88. A promises to give his brother B his watch but as he does not have it with him cannot make the delivery at once. He gives his brother C his stick pin by delivering the same over to him. When A obtains his watch he decides not to deliver it to B. He also desires his pin from C. B has no right of any sort against A, but C owns the pin. A cannot reclaim it.

THE UNIFORM SALES ACT

We noticed in an early part of this book the appointment of Commissioners on Uniformity of Legislation

and their work in drafting certain codes for enactment by such states as should deem them desirable contributions to their local law. One of the first few subjects to which attention was given by the Commissioners was the subject of sales. The proposed law was drafted, adopted and recommended for passage by the various states and was thereafter adopted by a large number of them. The law does not seek to make fundamental changes in the law of sales, but merely to bring about uniformity, certainty, modernity and completeness. Necessarily, in some states, its adoption would mean a rejection of certain doctrines in cases in which opposing views had prevailed in various states, but the law as worked out through generations in meeting the conditions of commerce was not in its basic principles intended to be changed.

FORMALITIES REQUIRED IN LAW OF SALES

We have already noticed in our consideration of the general law of contracts that the Statute of Frauds makes provision for formalities in the case of sales of personal property. A sale may be oral or in writing or implied, except for the requirements of this statute which has been substantially copied into the Uniform Sales Act. We must remember about the provisions of the Statute of Frauds that

(1) The statute does not apply to executed sales;

(2) The statute does not apply to sales for a price less than an amount named ($50 by the old statute of frauds, $500 by the Uniform Sales Act, changed by some states to various sums in their adoption of the Sales Act);

(3) The statute is satisfied and the sale thus made enforceable:

(*a*) If there is a written memorandum signed by the party sought to be charged;

(*b*) If all or a part of the price is paid;

(*c*) If all or some of the goods are delivered and accepted;

(4) The fact that the statute is not complied with in any sale or contract to sell is no indication that the contract will not nevertheless be performed. Honest men carry out their bargains, and the statute was passed as a protection against the inventors of false testimony. Unfortunately, parties who contract sometimes avail themselves of the technicalities in cases in which they should lose on the merits.

Questions and Problems

(162) What is covered by the title "Law of Sales"?

(163) Define a sale.

(164) Define "title," "ownership," "property," "possession."

(165) State Example 86.

(166) State Example 87.

(167) A is a jeweler and delivers "jeweler's sweepings" to B, who is to separate the dross from the quantity and either deliver the precious metal to A, less a specified quantity for his services, or pay A the value. On the same day that A delivers the metal to B it is destroyed by fire. B claims that this discharges his obligation. Is he right? Why?

(168) A promises to give his nephew his horse and a saddle. He hands B the saddle, but the horse, not being present, is to be delivered later. Later A changes his mind and wants the saddle back and refuses to give the horse. Can B keep the saddle? Can he get the horse? Why?

(169) What is the "Uniform Sales Act"?

(170) How does the Statute of Frauds affect sales of personal property?

(171) Name two classes of sales to which the Statute of Frauds does not apply.

(172) A buys an automobile, the transaction being entirely oral. He pays down $10 on the purchase price, balance to be paid when he gets the car. He afterwards refuses to take the car and being sued, pleads the Statute of Frauds. Is it a good defense? Why?

CHAPTER XXIV

WARRANTIES IN SALES

DEFINITIONS

Warranty defined. What more natural than that he who desires to sell goods should make exaggerated statements as to their merits. The salesman will "puff his wares." A seller who makes assertions concerning his goods does so for the purpose of inducing the buyer to buy. Such assertions may become or may not become a part of his contract. If they do become a part of his contract they are called "warranties." When do they thus become a part of his contract? Not when they are in the nature of opinions and predictions; but if they are statements of fact they then are a part of the transaction and the seller must make good. A warranty, then, we may define as an *affirmation of fact made by a seller concerning the qualities or title of the goods sold, for the purpose of inducing the buyer to buy, and upon which the buyer relies.*

Knowledge of facts by seller immaterial. In the law of sales an affirmation of fact concerning goods in process of sale becomes a part of the contract of the sale and may be enforced as such irrespective of the intention or knowledge of the seller. He has made an assertion, therefore let him be held to its truth, for the statement is a part of his contract. If I sell a horse and

warrant it sound, it is a part of my contract that the horse is sound, and whether I knew him to be sound or unsound does not alter the fact that it was upon the faith of my statement that the buyer buys the horse. If the statement is knowingly false, the buyer may at his option sue in tort for fraud.

Opinions and predictions not warranties. It has always been the law that a seller may puff his wares. He may indulge in " dealers' talk." We expect one who sells goods to praise them as the best. If he has no faith in his goods, he cannot sell them to others. The automobile salesman may admit that there are better cars, but none better in the class that this car represents. He makes extravagant predictions, his opinions are enthusiastic. One cannot build a warranty out of such encomiums. As in the law of fraud, so here in the law of warranty, we must have statement of *fact*, not mere opinion, to constitute an assertion upon which one can base a suit for damages.

Example 89. A being about to sell B a cash register states that B can dispense with the services of a bookkeeper. B finds that he cannot do so. He has no case.

Example 90. A warrants that a car will go a certain number of miles on a gallon of gasoline under certain conditions. This is a warranty and is a part of the bargain upon which B can rely. It is not a statement of opinion but of *fact.*

EXPRESS WARRANTIES

Express warranties defined. We have already defined a warranty. It is called express when it is made orally or in writing.

Example 91. A offers to sell B a horse. B seems willing to buy on A's terms but expresses doubt as to the animal's soundness. A says, "The horse is sound," and B buys. A's assertion is an express warranty. (Hobart *v.* Young, 63 Vt. 363.)

Oral warranties not provable to contradict or add to written contracts. Attention is drawn here to the discussion of the parol evidence rule on page 84 of this book and one of the examples there given in the case of a sale.

No implied warranty where express warranty covers same subject matter. An implied warranty may of course exist when the contract is in writing or oral. Otherwise we could not have such a thing as implied warranties. But an implied warranty cannot be shown where the parties have in their language covered the point.

THE IMPLIED WARRANTIES

The implied warranty of title. One who sells goods impliedly warrants that he has (or in case of a contract to sell that he will have) the ownership of the goods or power to dispose of them, that they are unencumbered and that he will defend them against all lawful claims.

This implied warranty is of the utmost importance, as a person who buys goods which the seller has no ownership in, or right to sell, must yield them to the true owner if he appears to demand them. His remedy is by suit against his seller. And that suit is based upon the theory that the seller of goods impliedly warrants title.

The implied warranties of quality or capacity enumerated. In a contract of sale of personal property

there may be one or more of the following implied warranties of quality or capacity of the goods sold.

(1) Warranty that goods sold by description will be as described.

(2) Warranty in a sale by sample that the goods shall correspond with the sample.

(3) Warranty in a sale by sample where the seller is the manufacturer, that the goods shall be merchantable.

(4) Warranty of merchantability of goods sold by description.

(5) Warranty that goods purchased for a particular purpose known to seller are fit for that purpose.

No warranties of quality where the very goods sold are present at sale and buyer has reasonable opportunity of inspection. Where one being neither dealer nor manufacturer sells goods to another which are present subject to inspection, there is no implied warranty. This is the simplest case of a sale and the rule is " Caveat emptor " (Let the buyer beware).

> **Example 92.** A has an automobile which he has used several seasons which he wishes to sell. He offers it to B for $500. B looks the car over and buys it. There are no implied warranties of quality in this case. There is of course the implied warranty of title. We know from our consideration of the law of frauds in contracts that A must not be guilty of covering up defects known to him so that they will not be discoverable by B. Also defects of a serious character known to him which B cannot discover on reasonable inspection must be disclosed by A.

Implied warranty that goods sold by description will be as described. If one purchases goods by description he is entitled to the very goods which in his contract

of purchase he has described. This has been said not to be so much a warranty as a mere requirement that the contract which one makes be performed as made. But it is conveniently treated as a warranty.

Implied warranty in sale by sample that goods will correspond with sample. Goods are frequently sold by sample. The purpose of showing the sample is to represent the character of the goods to be sold. One cannot display a sample of certain quality and thereby induce purchase without becoming liable to deliver goods of equal quality with the sample.

When are goods sold by sample? A sample is usually an article which will not constitute a part of the bulk delivered, as where a piece of silk is produced to show the quality of dress goods offered for sale. A sample may be out of the bulk itself and constitute a part thereof on delivery. But it is possible that a part of the bulk might be taken out for the purpose of enabling the buyer to make inspection and without any representation by the seller that the goods are like the part produced. The circumstance would have to show the intent of the parties. (Bierne *v.* Dord, 5 N. Y. 95.)

Implied warranty in a sale by sample when seller is manufacturer that the goods shall be merchantable. There is a warranty in a sale by sample that the goods shall be as good as the sample. There is also a warranty in a sale by description that the goods shall be merchantable. The fact that the sale is by sample ought not to make the obligation of a manufacturer to furnish good goods any the less stringent. It would not ordinarily be supposed by a buyer from a manufacturer that the manufacturer could, by displaying a sample

(which might have unknown defects) minimize his liability, which would impliedly exist if he had not shown the sample.

Implied warranty of merchantability where goods are sold by description. A person buying goods by description from a manufacturer or grower buys with the object of getting goods without unusual defects, or as we say, *merchantable*. It has been decided in some states that this rule applies to a dealer who does not manufacture or grow the goods sold, but the Uniform Sales Act extends the rule to that case where, from the circumstances, it is reasonable to suppose that the buyer relied on the judgment of the seller.

Implied warranty that goods purchased for a particular purpose known to the seller shall be fit for that purpose. There is an implied warranty of fitness for the particular purpose for which the buyer buys, whether the seller is manufacturer or grower or not, whenever it is apparent that the buyer relied upon the judgment of the seller to supply the thing needed.

> **Example 93.** A has a lumber yard and applies to B, who deals in engines, for an engine which will do certain work. B undertakes to supply an engine for the purpose wanted. The engine which he supplies, although a good engine, will not answer A's purposes. There is a breach of warranty. (Marbury *v.* Stearns, 32 Ky. Law Rep. 739.)

No such implied warranty of fitness where buyer orders a known, described and definite article. To imply the above warranty the buyer must rely upon the judgment of the seller. There is no such reliance where the buyer orders a "known, described and definite" article.

Example 94. In the above example, A orders "No. 2 Smith Engine" and B supplies an engine of that kind, of good material and in no way defective. A gets what he bargained for and it does not concern B whether it will do A's particular work or not. That was A's lookout when he used his own judgment to decide upon the kind of engine he wanted.

Questions and Problems

(173) Define a warranty. Is a seller's ignorance material?

(174) A, about to make a sale to B, says, "If you buy this stock it will sell for twice as much within a year." The stock goes down. B sues A. Is A liable on the assertion?

(175) Distinguish between Example 89 and Example 90, explaining why one is a warranty and the other not.

(176) A, selling a horse to B, says that the horse is sound. The horse being unsound, B sues A. A replies that the statement was only his opinion. Is he right?

(177) A sells a watch to B. The watch has been stolen from Y by X, who sold to A. Y claims the watch from B. What right has B against A?

(178) State Example 92.

(179) If sale is by sample, what warranties are there?

(180) A orders canned peaches from B, a canner of peaches. The peaches spoil on account of some defect in canning. A sues B. What warranty shall B claim is broken? Will he win?

(181) A, having a packing plant, desires a refrigerator which will produce a certain degree of refrigeration within a given time in a certain room. He applies to B, who manufactures refrigerators, explains his needs and asks B if he cannot supply him. B supplies a good refrigerator but it will not do the work desired. A thereupon notifies B to take it out and refund his money. Has A a good case?

(182) In the case above, suppose A had ordered a certain known and described refrigerator from B, who knew his needs, and B had supplied the refrigerator ordered, what warranty or warranties would exist, if any?

CHAPTER XXV

TRANSFER OF OWNERSHIP

Introduction. A contract of sale is for the purpose of transferring ownership from one to another. Sometimes the transaction is one that takes considerable time for its performance. There is a certain interval of time at which, in that transaction, the title will pass from one to the other. We must be able to say at any time whether the goods belong to the buyer or the seller. Whether the ownership has passed depends upon the intention of the parties. To discover that intention certain rules of presumption have been laid down. They are not infallible and they are legally rebuttable by evidence showing a contrary intention.

Transfer of ownership may precede, be coterminous with or follow change of possession.

Let us notice these various rules as to transfer of ownership.

Title to unascertained goods cannot pass. As long as the particular goods to constitute the subject of the sale are not ascertained, the title cannot pass. This is a rule of law, not merely a presumption, and cannot be overcome by proof of a contrary intent, for it is simply impossible to transfer title to goods whose identity has not been ascertained.

Example 95. A and B make a contract by which A, a manufacturer of chairs, agrees to

sell B 100 chairs of a certain description. Until chairs have been appropriated to the contract, title cannot pass.

Title to ascertained goods passes according to the intention of the parties. Whether the goods are ascertained at the time of the contract or thereafter appropriated to the contract, title passes according to the intention of the parties. The following rules are framed to discover that intention.

Specific goods — in deliverable state, unconditional contract to sell. In this situation, unless a contrary intention appears, title is presumed to pass when the contract is made. This is true even if time of payment or time of delivery or both are postponed.

Example 96. A asks B if he will give him $25 for a wagon then in A's barn. B replies that he will and A says "sold." It is agreed that B shall take the wagon away the next day and hand A the money within a week. The same day the wagon is destroyed by fire without A's fault. B must pay for the wagon. It is his.

Specified goods — seller bound to put them in deliverable shape. In this situation the title is presumed not to pass until the thing is done which puts the goods in deliverable shape. The presumption will be overcome if the contrary intention appears from the facts.

Example 96 *a*. In the above case the wagon is incomplete and not in a deliverable state and A agrees to put it in a deliverable state for B's acceptance. Title is presumed not to pass until that is done.

Goods unascertained — goods in a deliverable state appropriated to the contract. If this situation appears, the title (unless a contrary intention appears) is presumed to pass when the appropriation occurs.

Goods to be delivered to carrier by seller for shipment to buyer. In those cases in which the seller is by the contract to deliver goods to a carrier for transmission to the buyer, title is presumed to pass when the goods have been by the seller transmitted to the carrier for that purpose.

> **Example 97.** A in New Orleans orders goods from B in Chicago to be shipped by B to A. B puts the goods in the possession of the carrier. They are destroyed en route. The loss is upon A as the goods have become his. He may of course hold the carrier if the carrier is at fault under the law of carriers.

Same situation except goods shipped "C. O. D." The result here is the same. Notwithstanding the carrier is to "collect on delivery," the goods belong to the buyer upon delivery to the carrier subject to a lien to be enforced by the carrier for the benefit of the seller.

Same situation — shipment by seller to himself as consignee. The seller may reserve title in himself by the form of the bill of lading. If he ships to himself at the point of destination he is said to reserve the *jus disponendi*. Title does not pass at the time of shipment. The same result may be accomplished by sending the bill of lading, made out either to the shipper or buyer, to a bank accompanied with a draft to be paid by the buyer before he can get the bill of lading.

Same situation — goods sent F. O. B. Sometimes the letters "F. O. B." (free on board) are used to indicate the point to which the seller is to pay the freight. Where such is the case title is presumed to pass at the point at which transportation charges, if any, are to be paid by the buyer.

Example 98. The goods in Example 97 are to be sent F. O. B. New Orleans. Title will be presumed not to pass until they reach New Orleans.

Risk of loss. Upon whom is the risk of loss as between buyer and seller? The general rule is that in the absence of contract to the contrary the risk of loss follows the title. If title has not passed, the risk is upon the seller; if it has, the risk is upon the buyer.

Example 99. A agrees to sell B a certain desk. Before title has passed the desk is destroyed by fire. The loss is A's. B need not pay for the desk. Suppose title had passed, but A still had the possession. The loss would be B's. His property is destroyed and if he had not yet paid for the desk, he would be obliged to do so.

In cases in which all the circumstances indicate transfer of ownership, but the seller retains title for purposes of security, the risk of loss is on the buyer notwithstanding such reservation of title. This is the better rule, though it has not been always recognized. There are two classes of cases: (1) where the buyer is given possession of the goods, but it is stipulated that ownership is reserved until all or a part of the purchase price is paid; and (2) where goods are shipped, and the shipper retains title in himself during shipment for purposes of security.

Questions and Problems

(183) Is change of ownership in a contract of sale necessarily coterminous with change of possession?

(184) A contracts to sell B 10 cattle of a certain description out of a herd of 150, to be selected by A and delivered to B. A refuses to perform. B claims ownership of ten cattle. Is he right? Why?

(185) If the goods are ascertained at the time of the sale and in a deliverable state, what is the presumption? If not in a deliverable state, what?

(186) A, in Chicago, orders from B, in New York, a quantity of wrapping paper. B ships it via M. Ry. Co. The goods are lost en route. Must A pay B for the goods?

(187) In the above case suppose goods had been shipped "C. O. D." Would this change your answer?

(188) What is the meaning of letters "F. O. B.," often used in contracts of sale? Do they have anything to do with transfer of ownership?

(189) With whom is risk of loss as between buyer and seller?

CHAPTER XXVI

SALES BY TRANSFER OF DOCUMENT OF TITLE

Purpose of documents of title. When personal property is shipped, a document is issued showing its possession by the carrier and setting forth the contract of shipment. This document is called a *Bill of Lading*. When goods are stored in a public warehouse a similar document shows the possession by and the contract with the Warehouse Company. This document is called a *Warehouse Receipt*. Documents of this kind are called *Documents of Title*. They represent the goods, and the sale or pledge of the goods can be accomplished by a transfer of the document representing the goods.

There are certain other documents which are also documents of title from another standpoint — documents in which the transfer of title is made or evidenced. Such are deeds of real estate and bills of sale of personal property. These, however, are not documents of title in the sense now intended. A bill of sale from A to B is not transferred in a sale of the property from B to C. B makes out a new bill of sale, or perhaps no bill of sale is used at all. In the case of the shipment or warehousing of goods, it is to be noticed that the owner of the goods has placed them with a bailee and has received from such bailee a document which represents the

ownership; and the law permits the transfer of such goods so bailed, by a transfer of the document so representing them.

Negotiable and non-negotiable documents of title. Bills of lading and warehouse receipts may be issued in non-negotiable form and negotiable form. A non-negotiable bill of lading is called a *straight* bill of lading and a negotiable bill is called an *order* bill. A negotiable document of title is issued to the "order" of a person, or to "bearer"; a non-negotiable document is issued to a certain person. *Both kinds of documents are transferable* to effect the sale or pledge of the goods themselves, but here is the difference. The railroad or bailee need not assume that a straight bill or receipt has been transferred until it has notice and may therefore deal with the original consignee or owner named in the bill without his production of the bill of lading or receipt, while it must be assumed that a negotiable bill or receipt may have been transferred and therefore its production must be required before the goods are surrendered. And there are also other differences for the protection of a transferee which we have not time to notice.

How transfer of document of title effected. The transfer of a document of title is effected by a delivery of the document properly indorsed where necessary. Negotiable documents of title are either to order of a certain person or to bearer. If to the order of a certain person he must indorse; but if to bearer, indorsement is not necessary but transfer may be accomplished by mere delivery. A non-negotiable document can also be transferred by assignment.

Questions and Problems

(190) What are the two main sorts of document of title? Why is a bill of sale not a document of title in the same sense?

(191) What is a negotiable document of title? What is a non-negotiable document?

(192) Must a document of title be indorsed when it is transferred?

(193) X Ry. Co. issues a non-negotiable bill of lading to A. A transfers it to B. B does not notify the Ry. Co. A applies at point of destination of goods (being consignee named in bill of lading). The Ry. Co. gives him the goods. B brings suit against the Ry. Co. alleging it should have required the production of the bill of lading. Can he win?

CHAPTER XXVII

OWNERSHIP AND RIGHTS OF THIRD PERSONS

IN GENERAL

THE ownership of the goods at any particular time has been considered from the standpoint of buyer and seller. The question may be important to a purchaser from buyer or seller or to a creditor of buyer or seller. Generally, the rights of such third persons depend upon the actual condition of the title. Thus, if A has made a contract of sale with B, and B's creditor C seeks to have an officer levy upon the goods, the right of C would depend upon whether, as between A and B, title had yet passed. So if A, contrary to his duty to B, should attempt to sell the goods to D, D could get no title unless title had not been passed. This is the general rule. There are some exceptions to be noticed.

SITUATIONS IN WHICH PURCHASER OR CREDITOR FROM BUYER OR SELLER MAY IGNORE TRUE OWNER

Seller allowed to retain possession. Notwithstanding the general rule that only a true owner can convey title, an exception exists in cases in which the seller in an absolute sale is allowed by the buyer to retain possession. This situation conduces so easily to fraud no matter how innocent the buyer may really have been in allowing the retention, that in many states the situation

constitutes legal fraud, which cannot be rebutted although in other states the presumption of fraud is a rebuttable one.

> **Example 100.** A owns sheep. His creditor sues him, obtains judgment and has execution levied on the sheep. C claims that some time ago he bought the sheep and that therefore they are not subject to B's writ; and he produces a bill of sale of prior date, asserting that he allowed A to remain in possession until a more convenient time. In many states C would be irrebuttably deemed a party to a fraud and the good or bad intention would be immaterial, although in some states he could overcome the presumption of fraud by clear proof of the good faith of the transaction.

Conditional sales. In most states one who gives possession of property to another under a contract that when a certain amount of money is paid the purchaser shall have title, the purchaser being in possession may transfer a good title to a third person who gives value and has no notice, *unless* the conditional sale is recorded pursuant to the provisions of the law.

Chattel mortgages. One who has a chattel mortgage upon goods which are in possession of the owner must protect himself by putting the chattel mortgage upon record and otherwise complying with the chattel mortgage law of the particular state.

Bulk sales. In many states a sale of all or the bulk of one's property (as the sale of a place of business) is void as to creditors unless certain formalities (as five days' notice to creditors) are complied with.

Questions and Problems

(194) May a third person ever ignore the actual condition of the title? What is the general rule?

(195) A sells an automobile to B, but as B is going to be out of town he requests A to keep and use it until he returns. A, taking advantage of his possession, sells to C, an innocent purchaser. B, coming back, finds C in possession and demands the car. Is B's title superior to C's?

(196) A sells goods to B upon installments of the price, title not to pass until the last installment is paid although B is to have immediate possession. B, before the last installment is due, and intending not to pay it, sells to C, who thinks B is the owner. Can A recover the goods from C?

CHAPTER XXVIII

THE EFFECT OF ACCEPTANCE

If the buyer accepts the goods it may be argued that he is satisfied in regard to the performance and cannot be heard to say that the seller has not performed his obligations. But it is readily seen that justice to the seller himself is often served by the buyer's acceptance. General rules may be stated. Let us first, however, ask what constitutes acceptance.

WHAT CONSTITUTES ACCEPTANCE

Acceptance consists in receiving the goods and retaining them after a reasonable opportunity for inspection has elapsed. There is the implied condition that a buyer of goods shall have a reasonable opportunity to inspect. He cannot always open the goods and examine them thoroughly before allowing them to be left. What constitutes reasonable opportunity depends on the nature of the goods and other circumstances. With this in mind as the meaning of acceptance, let us consider its effect.

AFTER ACCEPTANCE NO RIGHT OF REJECTION

The acceptance by the buyer after he has had a reasonable opportunity for examination will take from the

buyer his right to return the goods on account of the defects which such examination should have disclosed.

Example 101. A sells goods to B which B retains, knowing that they are not in accord with specifications. Whatever B's rights are for damages, he has waived his right to reject the goods.

RIGHT OF DAMAGES FOR DELAYED PERFORMANCE OR FOR BREACH OF WARRANTY

Acceptance does not bar the right to have damages for breach of warranty or for delay where the circumstances show that the buyer did not intend by his acceptance to accept the goods in full satisfaction. In such a case a buyer should accept under protest and with immediate notice to the seller of his claim. In some cases it has been held that acceptance of goods under a sale containing implied warranties waives the right to sue on the warranty, but this does not seem a logical distinction between express and implied warranties. The Uniform Sales Act provides that such acceptance shall not constitute waiver and adds that the buyer must in such a case within a reasonable time after he knows or should know of the breach, give notice thereof to the seller.

In the case of an express warranty there has never been any question but that the goods may be retained and suit for damages be brought on the warranty.

Questions and Problems

(197) A buys a set of books for B, a publisher. The books are delivered by messenger and A receipts for them. He looks through them during the next few days and finds several pages torn or blurred. Has he any right to return the books?

(198) A orders boxes from a manufacturer of boxes. They are defective boxes and A notifies the seller of that fact, but does not return or offer to return them. He sues for damages and the attorney for the seller asks the court to rule that by retention he has lost his right to have damages. Shall the court so rule?

(199) Is the rule the same in the case of an express warranty?

CHAPTER XXIX

THE REMEDIES OF THE PARTIES

THE RIGHTS OF AN UNPAID SELLER

Unpaid seller's lien. An unpaid seller has a lien upon the goods for the purchase price so long as they are in his possession, unless the sale was upon unexpired credit. He loses this lien by parting with the goods.

Right of resale and rescission. A seller in possession of goods may for the default of the buyer resell them or rescind the bargain where the goods are of a perishable nature or the buyer continues in default after a reasonable length of time even though title had passed.

Right of stoppage in transit. A seller who has lost his lien upon the goods by reason of their delivery to a carrier as an agent for the buyer may nevertheless stop the goods in transit and reassert his lien thereupon, when he learns of the insolvency of the buyer in time to stop them in such transit.

Right to sue for damages. The seller may sue for the purchase price when title has passed to the buyer, or he may sue for damages where title has not passed and the buyer refused to carry out his contract.

REMEDIES OF BUYER

Goods undelivered and title not passed. Here the buyer's remedy is to sue for damages. Only in very exceptional cases could he get the goods themselves.

Goods undelivered and title passed. In this case the buyer may get the goods by an action of replevin or he may sue for damages for wrongful detention.

Questions and Problems

(200) What is an unpaid seller's lien?

(201) What is the right of resale and rescission?

(202) Define right of stoppage in transit. When does it cease? Would it apply to the case of goods in shipment to which title had not been passed to buyer?

(203) State the remedies of a buyer against a seller in default.

PART V

NEGOTIABLE PAPER

CHAPTER XXX

FORMS OF NEGOTIABLE PAPER

MEANING OF WORD "NEGOTIABLE"

ONE party to a contract cannot, under the general law of contracts, transfer his right thereunder as an independent thing. Whoever acquires it from him by assignment must take it in its bearing upon and relation to the transaction in which it arose. Any other rule would involve any person who made a contract in greater obligations than he chose to assume. We have already noticed this principle; but an example will recall it to our memory.

> **Example 102.** B employs A at a salary of $100 per month. If A assigns his salary to C, C can get no better right than A has to the salary. The defenses of prior payment to A, non-performance by A, fraud by A, or other defense, if any, which B has, may be made as readily against C as against A, no matter what C gave to A as a consideration for the assignment.

We see at once the justice of this rule. One contracts with a party without intending that any other person shall have the right to step in and acquire rights that shall disturb the transaction in its mutual obligations.

There is, however, a need in the business world that contractual promises to pay money may be made in such form that they may be transferable as independent promises, separable from the transactions out of which they arose, to which credit can be given according to their verbal tenor without the possibility of unknown defenses being set up against their enforcement. To meet this commercial need, the law has said that a person making a promise to pay money may, if it is desired by the parties, indicate to the world at large by the form of his promise that the promisee may transfer it for value, and that when so transferred to an innocent party, the promisor will honor it according to its tenor, without reference to any counter rights which he might have against the party with whom he originally contracted. In this manner an obligation to pay money may come to have some of the properties of money and to an extent make the place thereof, as the holder thereof is enabled by its character to change it readily into money by selling or discounting it to another.

This indication of intention is accomplished by the form in which the obligation is expressed. The form which shall indicate this quality is settled by the law, and when one adopts that form he is conclusively presumed to have intended to give this negotiable character to his act. It is for this reason that *form* has so much importance in the law of negotiable paper. We shall see in our further study how much depends upon form, and also how the subject is set about with rules.

For this main reason in these days, whatever may have been its historical origin, and for other advantages which will appear in these chapters, we have the law of

negotiable paper, called also the law of *commercial paper*, the law of *negotiable instruments*, and the law of *bills, notes and checks*.

The law of negotiable paper deals with three classes of instruments: (1) promissory notes; (2) bills of exchange; (3) checks. There are various forms of each of these, as we shall indicate.

PROMISSORY NOTES

Promissory note defined and illustrated. A promissory note is "an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer."

Example 103. The following is an ordinary form of a negotiable promissory note.

$100 CHICAGO, ILL. — AUG. 1, 1919

Thirty days after date I promise to pay to the order of James Brown, the sum of One Hundred Dollars, with interest from date at the rate of six per cent per annum, value received.

HENRY JONES.

The holder of this note may sell it, and the purchaser need not concern himself with the details or nature of the transaction out of which it arose, as he would be compelled to concern himself were it non-negotiable. He knows that it is a promise to pay money put in this form in order that the holder might freely dispose of if to any one who, having purchased it for value and in good faith, could enforce it according to its tenor with-

out regard to its original part in the bargain which gave it birth.

Parties to promissory note. The party who makes a promissory note is called the *maker*. The party to whom it is payable is called the *payee*. Sometimes one makes a note payable to himself. In that case it is an incomplete instrument until it is indorsed by the maker-payee. Sometimes the payee is described as *bearer* (as we shall more fully note later). The payee may transfer this note. If he does, unless it is payable to bearer, he *must* indorse it, and if payable to bearer he *may* indorse it. Parties writing their names upon the back for the purposes of transfer are called *indorsers*. One who as payee or indorsee has paper at any particular time is called a *holder*.

Special forms of promissory notes. One special form of promissory note is a *certificate of deposit*, or paper issued by a bank certifying that the amount stated has been deposited and will be paid to the holder, with interest at a stated rate, upon the return of the certificate properly indorsed. It is negotiable if it contains all of the requirements of the law governing negotiable paper.

Another form of promissory note is a *bond*. When drawn to meet the requirements of the negotiable instruments law it is negotiable. This kind of bond must be distinguished from a penal bond given by one to insure his performance of an obligation under penalty of paying damages if he does not do so, and generally also joined in by a surety. Such bonds are, of course, not negotiable. A negotiable bond is a promise by the government, or municipal or private corporation or association to pay with interest a sum of money to the

holder of the bond. In the case of a government or municipal bond the issue of bonds is authorized by some law passed for that purpose and in the case of a private bond there is usually a security in the form of a mortgage or trust deed upon real estate owned by the makers of the bond issue. Bonds are issued in quantities constituting a *bond issue*. The bonds constituting the issue are of certain denominations, as $100, $500, $1000. The interest may be set forth in the form of coupons which can be clipped off and collected as they fall due. Such bonds are called *coupon bonds* and are made payable to bearer. A registered bond is a bond which provides for the registration of the owner or holder on the books of the company, and its transfer must be accomplished by change of registration.

BILLS OF EXCHANGE

Bills of exchange defined and illustrated. A bill of exchange may be defined as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money, to order or to bearer.

Example 104. The following is an example of a bill of exchange.

CHICAGO, ILLINOIS — July 6, 1918

Pay to the order of William Jones One Thousand Dollars thirty days after date, and charge to my account.

JOHN SMITH.

To Henry Hawley & Co.

Bills of exchange in sets. A bill of exchange is sometimes drawn in parts, usually three, similarly drawn, numbered consecutively and referring to each other, constituting what is called a set, the entire set constituting one bill. The parts may then be sent separately to insure arrival. Any part may be accepted by the drawee and that will constitute an acceptance of the bill. Inasmuch as any accepted part may be transferred with the legal effect of transferring the entire bill, a drawee ought not to accept more than one part, for if he accepts more than one he may be made to pay the bill more than once to innocent purchasers of different parts. Any one who takes an unaccepted part should be sure to get with it the other parts so that he may know that there is not an accepted part outstanding.

Parties to bills of exchange. The person who makes a bill of exchange is called a *drawer*. The person upon whom he draws his order is called a *drawee*. The person in whose favor he draws a bill is called a *payee*. If the drawee accepts the bill of exchange, that is to say, writes upon the face of it that he accepts it, he is called an *acceptor*. A bill of exchange may be indorsed either before or after acceptance, and the parties indorsing it are called *indorsers*.

Special form of bills of exchange. A special form of bill of exchange is called a *bank draft*, which is merely a bill of exchange drawn by a bank upon another bank in favor of some person who purchases the draft from the drawer bank. Thus if a person in Chicago desires to pay money to a person in New York he may buy a draft drawn by a Chicago bank upon a New York bank

with which the Chicago bank has made arrangements for such purpose.

Another form of bill of exchange or draft is called a trade acceptance. This is a draft or bill of exchange drawn by a seller of goods upon a buyer, in favor of a bank chosen by the drawer, for acceptances by the buyer before his bill is due. Its advantage is that the seller by discount at his bank may obtain payment of his bill at once, less the discount, and thus be in funds when he needs them. He may not use the paper.

CHECKS

Definition of check. A check is defined in the law as a bill of exchange drawn on a bank, payable on demand. The following is an example of a check.

Example 105.

Chicago, Ill., July 25, 1919 No. 736.

FIRST NATIONAL BANK OF CHICAGO

Pay to the order of Henry Jones $10 $\frac{00}{100}$

Ten and $\frac{00}{100}$ Dollars

Nathanael Burkhurst

Parties to checks. The maker of the check is called a *maker* or *drawer*. The bank upon which it is drawn is called the *drawee bank*. The party in whose favor it is drawn is called the *payee*. Those who write their names upon the check for purposes of transfer are called *indorsers*.

An accepted or certified check is a check which has been presented to the bank either by the drawer or by the holder for acceptance instead of for payment, and which has been accepted by the bank by an indorsement across the face of the check to the effect that it is accepted. This makes the bank primarily liable on the check and thus gives the check a currency it might not have before.

NEGOTIABLE DOCUMENTS OF TITLE NOT GOVERNED BY LAW OF NEGOTIABLE PAPER

Certain documents are described in the law as having negotiable qualities and are sometimes confused with and called negotiable instruments, but they are thoroughly distinguishable from the negotiable instruments described in this part of the book which are governed by the negotiable instruments law. We are now studying negotiable paper which is payable in money. Warehouse receipts and bills of lading may have negotiability, but they are instruments that are not payable in money and they are governed by an entirely separate body of law. Such instruments are more correctly described as *negotiable documents of title.* Being the evidences of the right to personal property other than money, they are necessarily to be governed by entirely different principles, notwithstanding the fact that they do possess some attributes of transferability which are similar to those possessed by negotiable paper.

Questions and Problems

(204) Explain Example 102.

(205) Why does the law establish forms of promises and orders to pay money which indicate negotiability?

(206) Why is form so important in negotiable paper?

(207) What are the three general kinds of negotiable paper?

(208) Define a promissory note.

(209) Draw up a promissory note.

(210) What do we call the party who makes a promissory note? To whom is it payable? Who indorses it?

(211) What is a certificate of deposit?

(212) Define a bond; a coupon bond; a registered bond.

(213) Define a bill of exchange; draft one.

(214) Name the different parties to a bill of exchange.

(215) What is a bank draft?

(216) What is a trade acceptance?

(217) Describe a check. Draw one.

(218) Who are parties to checks?

(219) What are negotiable documents of title? Are they covered by the law of negotiable paper? Why?

CHAPTER XXXI

REQUISITES OF NEGOTIABLE PAPER

Purpose of formal requisite. We have seen that the intention of the parties to make a promise negotiable in character is evidenced by the form in which they put it. The law furnishes that form and declares that when the form is used it is conclusive evidence of the intention of the parties to make the obligation therein expressed negotiable. Form, therefore, is very important in commercial paper.

The formal requisites stated. A bill, note or check, to be negotiable within the meaning of the negotiable instruments law, must comply with the following requirements: (1) it must be in writing; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand or at a fixed or determinable future time; (4) must be payable to order or to bearer; (5) where the instrument is addressed to a drawee he must be named or otherwise indicated therein with reasonable certainty. We will notice these requisites separately.

THE WRITING AND SIGNATURE

Writing necessary. We cannot have a negotiable obligation unless it is set forth and expressed in writing. The very idea of bill, note or check involves the thought

of a writing. Writing, however, includes typewriting and print.

The writing may be in ink or pencil. Prudence would dictate the use of ink, but a note, bill or check in pencil would not for that reason be non-negotiable.

Signature. The maker of a note or the drawer of a bill or check must *sign* it. By custom the signature is written below the instrument. Anything intended as a signature is sufficient, as a mark by one who cannot write, or an assumed name, as, for instance, a partnership name. In that case the persons meant to be designated by the assumed name and who authorized the issuance of the paper would be liable thereupon.

> **Example 106.** A, B and C form a partnership under the name "The Central Business House." C, acting for the firm, gives a note signed by the firm name. A, B and C are all liable on this note, for the name used is their assumed or trade name.

If there is an *incorporated* company, it has a distinct legal existence apart from that of its members. One purpose of creating corporations is to evade personal responsibility for debts. Hence in the above example if The Central Business House were a corporation and A, B and C its stockholders they would not personally be liable upon its contracts.

ABSOLUTE PROMISE OR ORDER

Unconditional promise or order requisite. Paper is not negotiable unless there is (in the case of a promissory note) an unconditional promise, or (in the case of a bill or check) an unconditional order. If the promise or order to pay is contingent upon some event or condi-

tion, it may show a good contract, enforceable upon the happening of the event or condition, but it is not negotiable. Thus I may promise to pay a sum of money to a person when he completes a building which he has promised to build for me. We have a good contract here, but the form of it does not comply with the law of negotiable paper (which may indeed have been my intention), and therefore is not negotiable. In *form*, therefore, the promise or order to pay must be unconditional or else it is not negotiable. This does not mean, of course, that one who has given a negotiable instrument cannot make his defenses to it when sued by the party to whom he has given it. Thus if I give a promissory note for five hundred dollars to John Smith, as advance payment of his salary, I can, if he does not earn the salary, defend upon that ground in the event I am sued by him, although my note was in the usual unconditional form. In other words, *as between the parties*, the absolute unconditional form of the promise or order does not prevent the opening up of all questions involved in the contract. *The unconditional form is required as a criterion to indicate intention that the promise or order is negotiable and may be acquired as such by third persons.* But if in form it is conditional or contingent, third persons thereby have notice that there is no intention that it can be severed from the rest of the contract and sold as independent paper.

Reference to transaction or consideration. The unconditional and negotiable character of a promise or order in a note, bill or check is not affected by the fact that a reference to, or statement of, the consideration or transaction, is made in the instrument, provided the

reference or statement is merely such and not a qualification.

> **Example 107.** A sells B a horse and takes B's note, payable in three months, for the purchase price. Upon the note the following words are written, "This note given for purchase price of horse this day bought by maker of note." A sells this note to C who acquires it in good faith, for value, and before it is overdue. C presents the note at maturity to B, who states that he will not pay it because A refused to deliver the horse. B can be compelled to pay the note to C. The statement of the consideration does not destroy negotiability and C is not subject to the defense stated.

If the statement qualifies the promise or order, or renders it in any way *conditional*, the instrument lacks negotiability.

> **Example 108.** A gives a note to B and therein puts the notation "subject to a contract between the parties." The note is not negotiable, and any person acquiring it would take it subject to the same defenses to which it would be subject had there been no transfer. (Klots Throwing Co. *v.* Mfrs. Com'l Co., 179 Fed. 813.)

Reference to fund or account. A mere reference to a fund or account to which the payer may look for reimbursement will not destroy negotiability, as the amount is still payable notwithstanding the insufficiency of such fund. But a direction to pay *out of* a fund destroys negotiability as the fund may not exist or be adequate.

> **Example 109.** A directs B to pay C or order $500 and adds, "charge to the Jenkinson account." If the bill is otherwise correctly drawn, this notation does not destroy negotiability.
>
> **Example 110.** If A had added, "pay out of the proceeds of our partnership venture," the bill would thereby have been deprived of

negotiability, as there is a reference to a fund which may or may not have existence or sufficiency. It is to be noted that paper must be negotiable from its form, without a necessity of inquiry about extrinsic conditions. (Meany *v.* Pool, 136 N. Y. 610.)

CERTAINTY OF SUM

Certainty of sum requisite. It is essential to negotiability of a bill, note or check that the amount of the sum payable should be certain.

Example 111. A makes a note to B, or order, for payment of $500, adding "and also all other sums which may be due." This may be a good contract, but even if otherwise correct in form it lacks negotiability on account of the uncertainty of the sum. (Smith *v.* Nightingale, 2 Starkie (Eng.) 375.)

What will not make sum uncertain within the rule. The negotiable instruments act provides that a sum may still be regarded as certain within the rule, although it is payable "with interest," or by stated installments, or with exchange, whether at a fixed rate or at the current rate, or with costs of collection or an attorney's fee in case payment shall not be made at maturity.

PAYMENT IN MONEY

Payment in money requisite. An instrument to be negotiable must be payable in money. Thus it has been held that a promise to pay bearer "one ounce of gold" is not negotiable (Roberts *v.* Smith, 58 Vt. 192) and that a promise to pay a certain amount of money *and* do another act (Martin *v.* Chauntry, 2 Str. (Eng.) 1271), or to pay money *or* do another act (Matthews *v.* Houghton, 11 Me. 377) is not negotiable; but a promise

to pay a certain amount of money *or* do something else at the *holder's* option is negotiable (Hodges *v.* Schuler, 32 N. Y. 114).

Specification of kind of money. The specification that payment must be in a particular kind of money does not destroy negotiability.

PAYMENT ON DEMAND OR DETERMINABLE FUTURE TIME

This requisite stated. In order to be negotiable a bill, note or check must be either payable on demand or payable at a fixed or determinable time.

Demand paper. Negotiable paper may be payable upon demand. Paper is payable on demand when it is stated to be so payable, or payable at sight or on presentation. It is payable on demand where no time for payment is expressed. An instrument payable on demand usually reads somewhat as follows: "On demand I promise to pay," or "Pay to James Smith or order on demand." A check is always payable on demand, and as the reader will note from Example 105 no time for payment is expressed in the check. If paper is payable on demand it must nevertheless be presented within a reasonable time for certain purposes as we shall note hereinafter when considering the rights of holders against indorsers and makers.

Paper payable at a fixed or determinable future time. If paper is not payable on demand it must, in order to be negotiable, be payable at a fixed or determinable future time. It is payable at a fixed or determinable future time when it is expressed to be payable at a certain date, or at a fixed period after date or sight, or on or before a fixed or determinable time specified

therein, or at a fixed period after the occurrence of the specified event which is certain to happen though the time of happening be uncertain.

Example 112. A note reading, "One year after date I promise to pay," etc. or "January 1, 1918 after date I promise to pay," etc. is negotiable if otherwise correctly drawn as it is payable at a fixed time certain to arrive.

Example 113. A note reading, "I promise to pay to the order of John Smith the sum of $1000 when he arrives at the age of twenty-one years" is not negotiable, as the payee therein named may never arrive at that age (although if based on a good consideration, it may be a good non-negotiable contract).

Example 114. A note reading, "I promise to pay to the estate of John Smith or order one year after the death of John Smith" is negotiable if otherwise correctly drawn, as the time of payment is certain to arrive.

Of course the usual manner of indicating the maturity of negotiable paper is to state that it is payable either on demand or upon a certain date.

PAYMENT TO ORDER OR BEARER

Words of negotiability necessary. In order to be negotiable a bill, note or check must contain words of negotiability. The instrument contains words of negotiability when it is payable to order or to bearer. Where an instrument is not payable to bearer it is usually made payable either "to the order of John Smith," or "to John Smith or order."

When payable to bearer. A bill, note or check may be payable to bearer and is regarded as so payable when it is stated therein to be payable to bearer, or when it is stated therein to be payable to a certain person or to

bearer, or when it is payable to a fictitious or non-existing person and such fact was known to the person making it so payable, or when the name of the payee does not purport to be the name of any person or when the only and last indorsement is a blank indorsement.

Example 115. A note payable merely "to bearer" is, if otherwise correctly drawn, negotiable.

Example 116. A note reading, "I promise to pay to cash" is payable to bearer and is negotiable if otherwise correctly drawn.

Example 117. A note reading that it is payable to John Smith or order and then indorsed by John Smith in blank, that is, merely by writing his name upon the back of the paper without other words, is payable to bearer.

When paper is payable to bearer it is negotiable by mere delivery, that is to say, without indorsement; any taker of it may require the indorsement of the transferor, and if the transferor indorses it he then becomes liable on it as indorser, but if he passes it by mere delivery he merely transfers the title to it and is not responsible as indorser, as we shall see.

PROVISIONS WHICH INSTRUMENT MAY CONTAIN NOT DESTRUCTIVE OF NEGOTIABILITY

An instrument may authorize the sale of collateral securities and this will not destroy negotiability if it is otherwise correctly drawn. It may authorize a confession of judgment against the maker in favor of the holder for the amount due and this will not destroy negotiability if the instrument is otherwise correctly drawn. It is in that case called a judgment note. Judgment clauses are not used in all states. A judgment clause reads usually somewhat as follows:

And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any Court of Record to appear for me in such Court, in term time or vacation, at any time hereafter, and confess a judgment, without process, in favor of the holder of this Note, for such amount as may appear to be unpaid thereon, together with costs and twenty dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue hereof.

Questions and Problems

(220) Why does the law prescribe certain requisites for negotiable paper?

(221) State the formal requisites.

(222) A makes a note in lead pencil and signs it with a rubber stamp impression of his name. The payee sues upon it. Can A defend on the ground of form?

(223) A sets up a tailoring business which he calls "The Grove Street Tailoring Co." He gives a note to the order of B, which he signs by this fictitious name. Is he liable on this note? Would he be liable if the concern were incorporated and he signed the note with the corporation's name by himself as its president? Why?

(224) A makes a note to B's order in terms payable when B delivers coal to A's place of business. Is it negotiable? Why?

(225) A makes out what he terms a bill of exchange which he addresses to B, stating: "If you will be so kind as pay C or order $100, you may charge to my account," and signs it. C sells this to D, who presents it to B for payment. B refuses. D thereupon presents it to A for payment, who refuses. D sues A. If this is a negotiable bill of exchange A is liable. Is he liable? Why?

(226) A makes a note to the order of B, noting upon it that it is given for a horse which A has purchased from B. B before maturity sells the note to C. C at maturity presents the note to

A for payment and it is refused upon the ground that the horse was diseased and B knew it and practiced a fraud upon A. If this note is not negotiable, C is subject to this defense. Is the note negotiable?

(227) Suppose in the last case the instrument had said "subject to a contract for a horse this day sold to the maker of this note." Would your answer be the same?

(228) A makes a note payable to B's order, who indorses and sells it before maturity to C. The note reads: "This amount payable out of my profits in the A. B. land venture." Is this note negotiable?

(229) "Chicago, Illinois, January 9, 1919. To James Smith, Please pay to this order of John Adams the sum of $500, less what is due you for burlapping. (Signed) Charles Brown." Discuss negotiability.

(230) "Chicago, Illinois, January 9, 1919. One year after date I promise to pay to the order of John Adams, $1000, and I agree in addition to paint his barn for him within three months from date. (Signed) Charles Brown." Discuss negotiability.

(231) A made an instrument in the form of a promissory note, promising to pay to the order of B $300 "and all other sums that may be due B." B sold and indorsed this instrument to C, who gave value and bought before maturity. It turned out that the note was entirely without consideration between A and B. Can A plead this defense against C?

(232) Is a note that provides for the payment of a "reasonable" attorney's fee for collection in case it is not paid at maturity, negotiable?

(233) A makes a note reading, "on or before July 1, 1916, I promise to pay," etc. Does this note comply with the negotiable instruments law as to time of payment?

(234) State all the cases in which negotiable paper is payable on demand.

(235) If negotiable paper is not payable on demand, when must it be payable?

(236) "Chicago, January 9, 1913. One year after A's marriage with B, I promise to pay to him or his order the sum of $1000. (Signed) Henry Smith." Discuss negotiability.

(237) "Chicago, Illinois, January 9, 1913. One year from date I promise to pay John Adams, $1000, value received. (Signed) John Brown." Discuss negotiability.

(238) What are words of negotiability?

(239) What is a judgment note?

CHAPTER XXXII

NEGOTIATION OF NEGOTIABLE PAPER

MEANING OF NEGOTIATION

Negotiation defined. Negotiation is the act of transferring negotiable paper for the purpose of investing the transferee thereof with the legal title. In other words, it is an assignment of the paper with the peculiar properties which attach to such an assignment under the law of negotiable paper.

Negotiation accomplished by delivery. Negotiation may be accomplished by mere delivery, that is to say, without any indorsement, in all cases in which the paper is payable to bearer. It will be remembered that paper is payable to bearer (1) when it is so stated to be payable, (2) when it is payable to a certain person or bearer, (3) when it is payable to a fictitious payee, or (4) to a payee not intended by the maker to have any interest in the paper, and (5) when it is indorsed in blank. Paper which is payable to bearer under any of these headings may nevertheless be indorsed, as the taker of such paper might not be content to receive it by mere delivery, and in case such paper is indorsed the transferor assumes a heavier liability than in case he transfers by mere delivery as we shall notice later.

Example 118. A draws a check payable to "cash." This check may pass from hand to hand by mere delivery, or it may be indorsed if the parties so desire.

Negotiation accomplished by indorsement. In any case where paper is not payable to bearer it must be indorsed in order to accomplish the transfer of the legal title. Thus, A makes a note payable to the order of B. B must indorse this paper in order to transfer it to C.

MANNER OF INDORSEMENT

Indorsement must be in writing. An indorsement of negotiable paper must be in writing. It might be with lead pencil, but this from a business standpoint would be inadvisable.

Indorsement must be on the instrument itself. The indorsement of negotiable paper is accomplished by writing the indorsement upon the back of the paper. The indorsement cannot be by a separate instrument in writing. If, however, the back of the paper has been filled up with indorsements, it is proper to attach another paper to the instrument as an elongation thereof to receive the further indorsements. This addition is called an *allonge*.

KINDS OF INDORSEMENTS

Indorsement in blank. An indorsement in blank is an indorsement accomplished by merely writing the name of the transferor upon the back of the paper.

> **Example 119.** John Smith makes a promissory note to the order of Harry Jones. If Harry Jones indorses this in blank he merely writes upon the back of the paper his name, Harry Jones.

Special indorsement. A special indorsement is an indorsement to some particular person. For example,

in the last illustration Harry Jones might have written upon the back of the paper, " pay to the order of Thomas Young," signed " Harry Jones." In this case the further negotiation of the paper would have to be accomplished by the signature of Thomas Young. In the case of a blank indorsement, the further transfer may be by mere delivery. A special indorsement is therefore a safer method, as in the case of a blank indorsement if the paper is lost or stolen and then sold to an innocent purchaser, the innocent purchaser would get a good title to the paper, while in the case of a special indorsement no such good title could be obtained on account of the lack of further indorsement of the special indorsee, and if any one forged such signature, no title could be taken through that forgery. In the case of a blank indorsement, the holder may transfer it into a special indorsement by merely writing above it, " pay to the order of " the person named.

Qualified indorsement. A qualified indorsement is an indorsement in which the indorser qualifies his contract by the addition of words to that effect. Such qualification is usually in the word " without recourse."

> **Example 119 *a*.** A makes a note payable to the order of B. B indorses without recourse to C. C applies to A for payment and finds A insolvent. He cannot compel B to pay the paper, as B by contract has qualified the indorsement and made himself merely a transferor and not a general indorser of the paper.

Conditional indorsement. A conditional indorsement is an indorsement by one to another to take effect upon certain conditions. The law provides that any one compelled to pay such paper may disregard the condi-

tion, that being a matter between the indorser and indorsee.

Restrictive indorsement. A restrictive indorsement is one which restricts a further transfer of the paper.

An example of a restrictive indorsement is an indorsement for collection only. Here further transfer is prevented except for the purposes of the restrictive indorsement. The other indorsements we have been considering do not restrict the further transfer of the paper. For instance, a qualified indorsement may be the first in a long line of indorsements.

Questions and Problems

(240) State meanings of " negotiation."

(241) A check is payable to " cash." State whether it must be indorsed to transfer it. Why?

(242) A note is payable to order of B. B writes his name in blank on back and transfers it to C. Can C transfer it without indorsing it?

(243) When must paper be indorsed in order to transfer it? If it need not be indorsed, might the transferor indorse it anyway? Why?

(244) Can an indorsement be on a separate paper? What is an *allonge?*

(245) What is an indorsement in blank? A special indorsement? A qualified indorsement? A conditional indorsement? A restrictive indorsement?

CHAPTER XXXIII

RIGHTS OF TRANSFEREE

We have seen that a primary purpose of making paper negotiable is to enable the taker thereof to take it as an independent obligation with no concern for the transaction out of which it arose. For instance, if a note is brought to him which he is requested to purchase, or upon which he is requested to loan money, he has nothing to do with the origin of that note or with the defenses that may be made against it in case suit is brought upon it against the original payee. He takes it for its face value as a promise or obligation to pay money. But some other important qualifications are necessary to be made. If there are defenses against the enforcement of the paper the party to whom it is negotiated must show in order to recover against the maker or acceptor, that he received it under certain conditions. He must show that he received it before it was overdue; that he gave value for it; and that he took it in good faith; and further if indorsement is necessary to its title he must show that it was properly indorsed to him before he received notice of the defense. A party who takes paper, having complied with all these requirements, is called technically a "holder in due course." The phrase, holder in due course, therefore describes one who has received negotiable

paper: (1) for value; (2) in good faith; (3) before it was overdue; (4) by proper indorsement where necessary. Such a party is sometimes described as innocent purchaser for value, but the best description is that of holder in due course and this technically contains all the elements that are necessary to give him as perfect a title as he can obtain under the law of negotiable paper. If there are no defenses that can be made to the enforcement of the paper, then it is not necessary that a taker show that he is a holder in due course. In other words, a note may be transferred after it is mature and may be the subject of a gift, and the maker thereof must pay it to the person to whom it is so transferred if he has no defenses that he could have used against the party who transferred it.

Example 120. A makes a note payable to the order of B. B transfers it to C. If A has any defense to the enforcement of this paper, C must show that he acquired it as a holder in due course. But if A has no defense and must pay it to B, in case B does not transfer it, then he must pay it to C in case B does transfer it, even if B transfers it after maturity and without value, for it is no concern of his when the transfer took place or what B got for it. He owes the money and must either pay it to B or to any one to whom B has transferred the evidence of the indebtedness.

We will now consider briefly the different items which enter into the definition of holder in due course.

WHAT IS HOLDER IN DUE COURSE?

Holder in due course must take paper by necessary indorsement. If paper is not payable to bearer, either by its tenor or by the manner of its indorsement, a

party who desires to enforce it against the maker in spite of the defenses that such maker may have against it, must show that the requisite indorsement to him was made before he received notice of a defense.

Example 121. A has a check drawn by B, payable to A or order. A secured this check in a fraudulent transaction. He transfers the check to C, who gives value for it and has no notice of the fraud. The indorsement, however, was overlooked at the time of the transfer and C receives notice of the fraud before he procures the indorsement. His right to enforce the check against A is subject to the same defense which A could have made against B.

Holder in due course must give value. One who seeks to qualify as a holder in due course must give value for the paper which he acquired. It is not necessary that he give full face value, and he may even purchase at a heavy discount, although the amount which he gives might be an element in determining whether he purchased in good faith.

Example 122. A makes a note payable to order of B for the sum of $100. B sells it to C for $90 before it is overdue; C purchases in good faith. C can compel A to pay $100 on this note notwithstanding A might have had a defense against B had B brought the suit. If, however, C had purchased this note for $10, that with other evidence might go to show that he bought it in bad faith. But except for this purpose the amount which C pays is immaterial, and if A has no defense, B may, as we have seen before, give it to C for nothing or sell it for what he pleases, and it will be none of A's concern, for if he must pay it to B he loses nothing in a transfer of B's right to C, whether that transfer is by way of gift or sale. In other words, the holder of a note may give it away, as is frequently done, and the donee may enforce it

for its face value unless there are defenses against it, and he is subject to these defenses unless he has given value.

Holder in due course must acquire paper in good faith. To be a holder in due course the taker of negotiable paper must purchase it in good faith. It is not necessary that he be diligent in discovering possible reasons for not purchasing it, but it is enough if when he buys it he had no notice of any defense against its enforcement and buys it under such circumstances as to show good faith on his part. If he has notice of any defense against its enforcement, he is subject to that defense, as of course he is not then purchasing in good faith, or if the circumstances are so suspicious as to indicate that he must have been a party to a fraud against the maker or must have known that there was something wrong, whether he knew exactly what that was or not, he will not be a holder in good faith.

Holder in due course must acquire paper before it is overdue. Overdue paper may be transferred in the same manner as paper not yet due; but if the person who is liable on it as maker or acceptor has defenses against the person to whom he gave it, he can make these defenses against one who buys it after it is overdue, although such transferee gave value and had no notice of the defense. In other words a holder in due course must acquire the paper before it is overdue. In this connection paper which is due on demand is considered overdue when it has been outstanding more than a reasonable length of time since its issue or last transfer.

Taker from holder in due course is holder in due course. If one takes paper from a holder in due course he is a holder in due course for that reason.

Example 123. A makes and delivers a note to B or order. The note is procured by fraud which A could set up against B if sued by B. B transfers to C, who takes in good faith before maturity and for value. After maturity C transfers to D, who gives no value. C is a holder in due course and D is therefore a holder in due course for he succeeds to C's title.

RIGHT OF A HOLDER IN DUE COURSE AGAINST PARTY PRIMARILY LIABLE

General statement. We have frequently said heretofore that negotiable paper is paper which can be transferred with the effect of giving the taker a better right than the transferor himself had, and that a person buying negotiable paper may disregard the circumstances of the transaction out of which it arose and consider it as an independent obligation so long as he actually has no notice of anything wrong and bought for value and before overdue. We must qualify that statement at this point to some extent. The law of negotiable paper requires that paper be transferred without taking with it the defenses between the original parties, but there are some unusual defenses in which this demand of the law of negotiable paper runs counter to stronger reasons of public policy, and must therefore give way to the reasons existing in those exceptional cases. All the defenses that merely arise out of contract between the parties are subject to the law of negotiable paper, and cannot be used as defenses against the holder in due course. But where this requirement of the business world runs against a stronger demand of some other branch of the law a qualification must be made in favor of that other branch of the law. For

instance, the general policy of the law of negotiable paper would require that the defense of infancy could not be set up against a holder in due course, but the law protecting minors also requires that a minor be enabled to assert his minority against all the world, and this requirement is stronger than the requirement of the general law of negotiable paper and therefore the law of commercial paper makes a qualification that a holder in due course, while generally not subject to defenses, is subject to this defense. It is for reasons of this sort that we now see that notwithstanding the general rule that a holder in due course does not take subject to defenses, there are some defenses to which he is subject.

DEFENSES WHICH ARE NOT GOOD AGAINST THE HOLDER IN DUE COURSE

General statement. The following defenses which could have been made against the party from whom the paper was acquired had he brought suit thereon cannot be made against one who acquires the paper under such circumstances that he is constituted a holder in due course. These defenses are called *personal defenses*, as in the law of negotiable paper they can be made only against certain persons, namely the original party to the contract, and not against one who has taken the paper as a holder in due course. They are the usual defenses which would be raised. They consist in matters which arise out of the merits of the transaction itself.

Fraud in the inducement. This is a defense which cannot be made against a holder in due course.

Example 124. A sells mining stock to B, fraudulently representing the value of the stock,

and B gives A his negotiable promissory note in payment for the stock. Before his paper is overdue A sells it to C for value, C taking it in good faith. C sues B. B will not be allowed to make the defense against C of fraud which he could have made against A had A brought suit on the paper. If C has not bought under all the conditions which make him a holder in due course, he is subject to the same defense to which A would be subject had suit been brought by him.

Lack of consideration. If a negotiable instrument is not supported by consideration, it is, under the general rule of contracts, not enforceable. But if it is sold to a holder in due course, this defense cannot be made against him.

Example 125. A as a present to B gives B his promissory note for $500. B sells to C, the holder in due course. C sues A. Defense of no consideration, which could have been made against B had he brought suit, is not good against C.

Failure of consideration and **breach of contract** are defenses which are not good against a holder in due course.

Example 126. A contracts to sell B a horse thirty days thereafter, and B gives his promissory note for the purchase price. Before the time of the performance of the contract the horse dies. Before the note is due A sells the note to C, for value, who has no knowledge of the defense. The defense which could have been made against A could not have been made against C, a holder in due course.

Payment before maturity is a defense which cannot be made against a holder in due course. If a person pays negotiable paper before it is overdue, he should be sure to take up the paper.

Example 127. A borrows $100 from B and gives his note for sixty days. In thirty days' time, having the money, he goes to B and states that he desires to pay the note. B states that the note is in a vault to which he does not have immediate access, but he will take the money and give A a receipt and send him the note in a day or two. As a matter of fact B has borrowed money from C and given A's note as collateral. B fails to take care of the paper and becomes financially insolvent. C sues A. The defense of payment which A could have made against B cannot be made against C, the holder in due course. A was unwise to make payment of this paper unless B produced it for him to take up upon payment.

Set-off is a defense which cannot be made against a holder in due course. In other words, if the maker of a note has a counter-claim against the original payee, which he could have set off against the payee's claim in reduction or discharge thereof, he cannot avail himself of this defense if the payee transfers the instrument to a holder in due course.

Theft or lack of delivery of paper payable to bearer is a defense that cannot be set up against a holder in due course.

Example 128. A makes a note payable to the order of B, and B indorses it in blank. This makes the paper payable to bearer. B then loses the paper and it is found by C, who transfers it to D. D, who is innocent, pays value and takes the paper before it is overdue. A is liable on this paper as maker and B as indorser. Had this paper not been payable to bearer by the fact that the last negotiation was a blank indorsement, or, in other words, had indorsement been necessary to transfer and had C forged that indorsement, then D would have gotten no title as it would have been necessary for him to trace title through a forgery, which cannot be done.

DEFENSES WHICH ARE GOOD AGAINST A HOLDER IN DUE COURSE

General statement. The above defenses, known as personal defenses, are the usual defenses which would be sought to be raised against the enforcement of negotiable paper, and, generally speaking, arise out of the merits of the transaction and are cut off by a transfer on account of the demand of the business world to have paper which will in the law accomplish this object. We now take up a few defenses which can be made even against a holder in due course for the reason that the need of allowing these defenses on account of other principles of law is greater than the need arising out of the law of commercial paper, and this law therefore makes an exception of these cases and a holder in due course is not protected.

Forgery is a defense that can be made against any one. The reason is clear. If one's name is forged to a note, bill or check, then the paper is simply not his paper. That is all there is to it. If by forgery one could make another person liable even to a holder in due course, then any man's fortune could be taken from him at any time through no fault of his own.

Fraud in the inception or execution is a defense that can be made against a holder in due course provided the party sought to be held liable was not negligent in putting his name to the paper which he had no intention of signing. But it must be clear that some trick was worked upon him which would prevent him, as a reasonable man, from knowing what he had actually signed. Ordinarily one is liable to a holder in due course

if he does not read the paper which he signs, or if he does not use due precaution, under all the circumstances, to know what he is signing. This defense is also a defense to be often looked upon with great suspicion as it is a very convenient defense for a man to make when he has been careless about signing paper, or when he is actually willing to falsify about the facts.

> **Example 129.** A requests B to recommend a friend for him for a certain position and hands B a paper which he states is such recommendation. B signs without reading it. It is in fact a promissory note which A afterwards sells to C C can compel B to pay this paper as B was careless under the facts. But if A had procured this paper by some trick which B as a reasonable man would not have avoided, then B's defense that the paper was not his act would be good against even a holder in due course.

Minority. A person under age can make his defense against the owner in due course.

> **Example 130.** A, who is sixteen years of age, gives his promissory note to B for $100, which he then squanders. B sells the paper to C, who does not know that A is under age. A can make his defense against C when he brings suit. Of course C could hold B for the amount of the note.

Material alteration is a defense similar to forgery and can be made against a holder in due course.

> **Example 131.** A makes a note to B for the sum of $100. B raises the amount to $1000 and sells the note to C. A can make the defense of alteration but he is liable on the note as originally given.

Where there is a material alteration the original condition of the instrument may have encouraged altera-

tion. In some states it is held that if a maker leaves uncanceled blanks in the instrument which are subsequently filled up by one who then sells to a holder in due course, the maker will be liable notwithstanding the material alteration on account of his negligence in leaving blanks in which words could be written. But in other states the courts take the position that leaving these blanks uncanceled will not make one liable in case of material alteration because, they say, a person need not contemplate that a forgery is going to be committed upon paper which he issues. It would seem, however, that it is not too much to require any one issuing negotiable paper to cancel the unfilled blanks by drawing a line through.

In this connection it might be mentioned that use of check protectors is not required by law, although often so stated. If A issues a check which B afterwards raises and then procures payment thereof by the bank, A cannot be made to stand the loss of this check merely because he did not use a check protector. The bank paying the instrument is the real loser unless it can hold the party who raised the check, which is usually impossible on account of his financial irresponsibility or departure from the community.

Check protectors are, however, for practical reasons, valuable. They enable the drawer of the check to show that he was careful, they do in fact keep checks from being altered, and for this reason prevent law suits.

Questions and Problems

(246) Who is a "holder in due course"? Why is it important for one to prove that he is such?

(247) When is indorsement necessary to constitute one a holder in due course?

(248) A makes a note to B's order and delivers it to B in payment of goods bought by A from B. B indorses the note to C, who gives nothing for it. C sues A. Under what circumstances does it become material to A whether C gave anything for the note or not?

(249) If in the last case there had been fraud in the sale of the goods and C had bought the note knowing of this, could A have made the defense against C? Could he if C had not known of it?

(250) Is a negotiable instrument still negotiable after its maturity? Why is it important to a purchaser of a negotiable instrument to buy it before it is overdue? When would it in fact be unimportant?

(251) When is demand paper overdue?

(252) A gives a note to B's order, who procures it by fraudulent statements as to the consideration. B sells to C, a purchaser in good faith, for value and before maturity. C after maturity transfers to D. D sues A. Can A make the defense that the note was procured from him by fraud?

(253) State Example 128.

(254) State Example 129.

(255) State Example 130.

(256) State Example 131.

(257) Enumerate the defenses which cannot be made against a holder in due course. Why are exceptions made in these cases?

CHAPTER XXXIV

LIABILITY OF PARTIES

CONTRACT OF PARTIES PRIMARILY LIABLE

Maker of note. The maker of the note is the party who ordinarily should pay it. He is the party primarily liable. He is liable upon the note according to its tenor. If the party to whom the note was originally given has not performed his part of the contract, then, of course, the maker of the note when sued can make all of his defenses just as if he were sued upon any contractual promise. The fact that the other party has secured a negotiable promissory note does not allow him to enforce the note if he is himself in default on his contractual obligations. The note is, however, *prima facie* evidence of its contents. If the note is transferred to a holder in due course, then A becomes liable according to the tenor of the note, notwithstanding the existence of defenses against the party to whom he gave the note, as we have seen in the chapter above, except those unusual defenses which were therein noted.

Acceptor of bill. The acceptor of a bill of exchange is liable according to the tenor of his acceptance. His liability is a primary liability.

A holder of a bill is entitled to have unqualified acceptance or none at all. He may, however, deem it to his

interest to take a qualified acceptance. An acceptance may be qualified as to amount, time of payment or other change. If the drawee will not give an unqualified acceptance and the holder will not take a qualified one, the holder may then treat the bill as dishonored for non-acceptance.

CONTRACTS OF PARTIES SECONDARILY LIABLE

Contract of transferor. We have seen that one who holds negotiable paper made by another may transfer it in some cases without indorsement, that is, by mere delivery, and in some cases with the required indorsement although in every case whether necessary or not the indorsement may be made. Such a party is not primarily liable in the ordinary case because in the final adjustment the party who made the paper, or was acceptor upon it, ought to pay it. This is shown by the following example.

Example 132. A borrows $5000 from B and gives B a negotiable promissory note as evidence of the indebtedness. B for $5000, less a reasonable discount, transfers to C. C buys goods from D and in payment thereof transfers A's note to D. D holds the note until maturity. Obviously the party who ought to pay this note is A, who has received $5000 and who has as yet given nothing therefor except his note. B has received and paid out $5000 and C is also in this situation. If either B or C pay the note it means that they are out $5000. However, by the law of negotiable paper, if A will not pay the note when it is presented, B or C must pay it and D could hold either B or C as indorsers at his option, leaving the party who is thus compelled to pay the paper to his recourse against the indorser above him or against the maker. If the maker has become insolvent the indorser will, of course, be the only loser.

There is a difference between the liability of one who indorses and one who transfers negotiable paper without indorsement. Where it is so transferable by its form we may think of a transferor of negotiable paper as having a twofold liability. In the first place we may liken him to one who sells personal property and becomes a warrantor of the title, and in addition to this we may think of him as having the liability of an indorser of negotiable paper in the cases in which he indorses. As a warrantor the transferor of negotiable paper warrants it to be genuine and what it purports to be, that is to say, not a forgery, that the prior signatures are genuine and that the prior parties had capacity to contract. This is the liability of one who transfers with or without indorsement, but if he does not indorse his liability only extends to the party to whom he transfers the paper and not to succeeding transferees. If, notwithstanding the paper is transferable by mere delivery, he indorses it, he assumes then in addition the liability of an indorser to all succeeding parties. One who indorses paper, whether his indorsement is necessary or not, assumes to any succeeding holder the liability that if the paper is unpaid at maturity by the maker or acceptor, or any party prior to him, that he will pay the paper to the then holder or to any one subsequent to him who has been compelled to pay it to the holder, provided the proper steps of presentment for payment, notice of dishonor and in some cases protest are taken to charge him. But if the indorser adds to his indorsement the words "without recourse," then he becomes liable merely as one who transfers without indorsement, except that his liability as a warrantor extends to all subsequent parties.

Example 133. A makes a note for $1000 payable to the order of B and delivers it to B. B thereupon indorses to C in blank, who transfers the note without indorsement to D, who transfers by indorsement to E adding the words "without recourse," who indorses to F. F, the holder, presents the paper to A for payment but finds that A has become insolvent. F thereupon gives notice of the dishonor of the paper by non-payment to B, C, D and E. F may in this case hold B or E but cannot hold C and D. If A had refused to pay the paper because he was a minor, or because it was forged, then F could have held B or E and also D, but he could not have held C because C did not indorse the paper. C, however, in that event would have been liable to D had D been the holder for he warrants the validity of the paper and the capacity of prior parties to his immediate transferee.

Drawer of bill. The drawer of a bill is secondarily liable. He is not liable upon the bill unless the bill has been presented to the drawee for acceptance in the cases in which such presentment is necessary as we shall see hereafter, or unless the bill has been presented for payment where acceptance is necessary, or where being not necessary it has been made. In case this presentment for acceptance or payment, as the case may be, has been made and notice of dishonor given the drawer, and protest properly made in cases in which protest is necessary, then the drawer becomes liable to pay the paper.

Drawer of check. The drawer of a check is secondarily liable thereon in case the bank upon which it is drawn refuses to pay it. Delay in presenting the check for payment or in giving notices to the drawer of the check will not excuse him unless he is damaged by such delay.

In case of certified checks, that is, checks presented to the bank for acceptance instead of presented for payment, the liability of the drawer of the check is discharged if the presentment for certification is made by the holder, but if such presentment is made by the maker of the check, the maker remains secondarily liable as though the check was not certified. The reason for this distinction is that if one has a check made by another and could have had it paid but instead thereof for his own advantage has it certified, he accepts the liability of the bank in lieu of the liability of the maker.

CONTRACT OF ACCOMMODATION PARTIES

What is accommodation party? An accommodation party in the law of negotiable paper is one who lends his credit to another by becoming a party to negotiable paper for that other. He accommodates the other party by lending him his credit. He may sign in the capacity of maker, indorser or acceptor.

> **Example 134.** A desires to procure credit from B, but B will not loan him money unless he presents some security or procures a signature satisfactory to B. A thereupon asks C to sign the paper with him. C agrees to do so for the purpose of enabling A to procure the credit. C may make a note to A which A can then indorse to B. He would then be an accommodation maker; or he can make the note as a co-maker with A, or he can have A make the paper to him and then indorse it to B, or he can have A draw upon him for the amount in the form of a bill of exchange and then accept the bill.

Liability of accommodation party. An accommodation party is liable to any person who has taken the paper upon the faith of his signature, and it is immaterial

whether such party knew him to be an accommodation party or not so far as this liability is concerned. He is just like a surety or a guarantor of credit; the money was advanced on the faith of his signature and he cannot now say that he was a mere accommodation party when the purpose of his signature was to enable the party receiving the credit to receive that credit. It is therefore the law that an accommodation party is liable to any one who has relied upon his signature, whether he was known or not known to be an accommodation party.

The accommodation party is not liable to the party whom he has accommodated, no matter in what manner he signs. Thus supposing A in order to obtain money through B makes a note payable to B's order, intending that B shall indorse it to any one from whom he can procure credit. B now holds the note made by A and ordinarily could compel A to pay it, but inasmuch as the purpose of the note was that of mere accommodation B cannot force A to pay the money to him or to loan him the money, as that was never the intention. A can therefore plead lack of consideration as far as B is concerned.

ACCEPTANCE AND PAYMENT FOR HONOR

Acceptance for honor. "Acceptance for honor" is an acceptance of a bill of exchange by one not named therein as drawee for the "honor" of some party to the bill. The acceptance may be for the honor of any party to the bill, but if not otherwise expressed, it is presumed to be for the honor of the drawer. It is allowable when a bill not yet overdue has been protested

for non-acceptance. It is also called "acceptance *supra protest.*"

An acceptor for honor differs from an accommodation acceptor in this fashion. The accommodation acceptor is named in the bill as a party thereto. An acceptor for honor is otherwise a stranger to the bill and steps in for the benefit of some party thereto to save that person's credit.

The acceptor for honor becomes liable on the bill according to the tenor of his acceptance to all persons subsequent to the party for whose honor he makes the acceptance.

Payment for honor. "Where a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon or for the honor of the person for whose account it was drawn." (Neg. Inst. Act., Sec. 171.)

The payment for honor after protest must be attested by a notarial act of honor, appended to the protest or forming an extension thereof. Otherwise the payment will operate as a mere voluntary payment, that is, give no right of reimbursement.

Where a bill has been paid for honor, all parties subsequent to the one for whose honor it was paid are discharged from liability, but the payee for honor succeeds to the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

Questions and Problems

(258) What is the contract of a maker of a note?

(259) What is the undertaking of an acceptor of a bill?

(260) A makes a note to B, which B indorses in blank to C, who without indorsement delivers it to D, who indorses it without recourse to E. A does not pay this paper when it is mature and asserts that being under age he will not pay it. E asks you to advise him what rights he has against B, C and D. How would you reply? Assume that all the indorsers have been given due notice of dishonor.

(261) What is the liability of a drawer of a bill? What is the liability of a drawer of a certified check?

(262) Who is an accommodation party? What is his liability?

(263) What is "acceptance for honor"? payment for honor?

CHAPTER XXXV

PROCEDURE TO CHARGE PARTIES SECONDARILY LIABLE

GENERAL STATEMENT

We have seen that parties to negotiable paper may be primarily liable, that is, liable at once upon maturity as the parties who have undertaken to pay the debt; and parties secondarily liable, that is, liable only upon the failure to pay of the party primarily liable. The classification is not arbitrary, but rests in the justice and nature of the case. Persons primarily liable are makers of notes and acceptors of bills or checks. They engage to pay when the instrument is presented for payment at or after maturity and are (usually) the real debtors. Parties secondarily liable are drawers of bills and checks and indorsers of bills, notes and checks. They are liable only upon the failure to pay of the party who is primarily liable. And having paid, they have their recourse against the party who is primarily liable and who should have paid, although on account of insolvency or for other reasons their right may be of little value or be discharged by bankruptcy.

For the reason that parties secondarily liable are liable in lieu of some one else who should have paid, the law provides for their protection by strict rules. Their

liability being of a secondary or contingent sort, the law establishes rules which must be strictly observed to fasten this liability upon them. There is a certain *procedure* to be followed. We will now notice what must be done.

PRESENTMENT FOR PAYMENT

The requirement stated. Presentment for payment to the party primarily liable at the time, at the place and in the manner provided by law is necessary to charge the party secondarily liable, unless such step is excused or waived by the party entitled to it.

> **Example 135.** A makes a note to B's order which B indorses to C. In order to hold B as indorser, C must present this note to A for payment at the time and place and in the manner provided by law, unless B waives the right or C is excused by some circumstance regarded by law as an excuse. If this step is omitted B is discharged, as the law regards that if the note had been so presented it might have been paid, or at least B, being informed by the further step of notice of dishonor, would have been able to take immediate steps to protect himself in his rights against A.

Bear in mind that this presentment for payment to the party primarily liable is required only for the benefit of the party secondarily liable. Presentment for payment is not required to fix liability of the party primarily liable. His liability already exists.

Date of presentment for payment. The holder must present the paper for payment upon the date of its maturity. Papers mature on the date therein stated, *without grace.* Formerly three days of grace were allowed, but these have generally been abolished.

Demand paper matures within a reasonable time after its issue. But in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

If paper falls due on Sunday or a holiday, the paper is not mature until the next succeeding business day. Instruments falling due on Saturday are to be presented on the next succeeding business day except that paper payable on demand may at the option of the holder be presented before 12 o'clock noon on Saturday where that entire day is not a holiday.

Hour of presentment for payment. Presentment for payment must be made at a reasonable hour on the business day of maturity. If the paper is by its terms payable at a bank, presentment must be made during banking hours, except where the person to make payment has no funds there to meet the paper at any time during the day, presentment may be made at any hour before the bank closes.

Presentment to whom. The presentment of the paper must be made to the person primarily liable, or to his agent in that behalf. If such person is absent or inaccessible, presentment may be made to any person found at the place where the presentment is made. If the person primarily liable is dead, and no place of presentment is specified, presentment for payment must be made to his administrator or executor, if such there be, and if with the exercise of reasonable diligence he can be found. If there are two or more persons primarily liable as partners, and no place of payment is specified, presentment may be made to any one of them, even if the partnership has been dissolved, but if they

are not partners presentment must be made to them all, unless a place of payment is specified.

Place of presentment for payment. Presentment for payment is properly made for the purpose of charging the parties secondarily liable,

(1) where place of payment specified, and there presented;

(2) where no place specified, but address of person to make the payment is given, and there presented;

(3) where no place specified and no address given, and presentment is made at the usual place of business or residence of the person to make payment;

(4) in any other case, to the person to make payment wherever he can be found, or at his last known place of residence or business.

Manner of presentment. The paper must be exhibited and, when paid, delivered up.

Presentment at maturity excused. Presentment for payment at maturity is excused, and the liability of parties secondarily liable fixed without presentment when delay is caused by circumstances beyond holder's control, but when cause ceases to operate, presentment must be made with reasonable diligence.

Presentment is not required when after exercise of reasonable diligence it cannot be made, when (in order to charge the drawer) the drawer has no right to expect that the instrument will be paid, and when the drawee is a fictitious person.

Waiver of presentment for payment. The party secondarily liable may waive the right to have presentment for payment, and this waiver may be embodied in the instrument or above his indorsement, or it may

be implied from the circumstances, and whether express or implied, may be made before or after the date of presentment.

Example 136. A gives a note in which it is provided that the "indorsers waive presentment for payment, protest and notice of dishonor." B indorses this note to C. C can hold B as indorser, although C does not present the note to A for payment.

NOTICE OF DISHONOR

The requirement stated. When a negotiable instrument has been dishonored by non-acceptance or by non-payment (having been duly presented for acceptance or payment), the parties secondarily liable (drawers and indorsers) are discharged unless they are given notice of dishonor at the time, place and in the manner required by law, unless the circumstances are such that the notice is for that reason dispensed with or unless the party entitled to the notice waives it.

Example 137. A draws a bill of exchange upon B, in favor of C, or order, which C indorses to D. D presents it for acceptance to B, and B refuses acceptance. D must give A and C due notice of this dishonor by B in order to hold A as drawer and C as indorser, unless circumstances dispense with notice or the right to receive notice is waived. Had B accepted and then afterwards at maturity refused payment, the same reasoning is to be made.

Example 138. A, for value received, makes a note to order of B and B indorses to C. C presents it to A for payment, which is refused. B is not liable if he is not given due notice of dishonor unless excused or waived.

When notice of dishonor must be given.

(1) *Where parties giving and receiving notice reside in same place.*

(*a*) If given at place of business, before close of business hours on day following dishonor.

(*b*) If given at residence, before usual hours of rest on day following dishonor.

(*c*) If sent by mail, it must be mailed in time to arrive in usual course upon day following dishonor.

(2) *Where parties giving and receiving notice reside in different places.*

(*a*) If sent by mail, it must be deposited in time to go by mail on day following dishonor.

(*b*) If not sent by mail, it must be given within the time it would have arrived by mail if so given.

(3) *Miscarriage in the mails* does not excuse parties secondarily liable where notice was properly mailed.

(4) *A party receiving notice has the same time* in which to give notice to prior parties liable to him as he had in which to receive notice.

Place at which notice of dishonor must be given.

(1) If address given with his signature, then to that address.

(2) If no address given, then either to post office nearest his residence or post office where he is accustomed to receive mail.

(3) If no address given, and he resides at one place and has a place of business elsewhere, then to either place.

(4) If sojourning elsewhere, then the notice may be sent to the place of sojourn.

Manner of giving notice of dishonor. Notice of dishonor should, as a matter of good practice, be given in writing and signed, but it is sufficient legally if not in writing, and if in writing if not signed or if the writ-

ing is incomplete and further supplemented by oral communication. The instrument should be described, but a misdescription does not vitiate the notice unless it actually misleads.

To whom notice of dishonor may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf. If the party, to the knowledge of the giver, is dead, the notice must be given to the executor or administrator, if there is one, and he can by reasonable diligence be found. If none, then the last residence or last place of business of the deceased. If the parties to be notified are partners, notice may be given to any party. If they are not partners, notice must be given to each unless one of them has authority to receive notice for the others. If a party has become bankrupt or insolvent, notice may be given either to the party himself or his trustee or assignee.

Waiver of notice of dishonor. Notice of dishonor may be waived by any party entitled to it either before or after the time for giving notice. This waiver may be express or inferred from the conduct of the parties. If a waiver is embodied in the instrument, it binds all parties to the instrument, but if written above the signature of any indorser it binds him only.

Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given or does not reach the parties sought to be charged.

Delay in giving notice of dishonor is excused when caused by facts beyond control of holder. When the cause of delay ceases, notice must be given with reasonable diligence.

PROTEST

This requirement stated. A bill of exchange which appears on its face to be a foreign bill (*i.e.* either drawn or payable or both drawn and payable in another state) must, in order to hold parties secondarily liable (drawers and indorsers) be protested in all cases in which it is dishonored by non-acceptance or non-payment except where protest is excused or waived. Protest is not necessary except in case of foreign bills.

> **Example 139.** A merchant in Chicago draws a bill of exchange upon a merchant in New York in favor of C, or order. C indorses it to D. D applies to the New York merchant for acceptance of the bill. The New York merchant will not accept. D must protest the bill for non-acceptance in order to hold C or the drawer. If the bill were presented for payment where it had not been previously dishonored by non-acceptance, and payment were refused, there would have to be protest for non-payment.

Essentials of protest. The protest must be annexed to the bill or must contain a copy thereof; must be under the hand of the seal of the notary making it and must specify time and place of presentment; the fact of presentment; the manner thereof; the cause or reason for protesting the bill; the demand made and answer given, if any; or the fact that the drawee or acceptor could not be found.

By whom protest may be made. Protest is usually made by a notary public, but it may be made by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Time of protest. A bill must be protested on the day of its dishonor unless delay is excused by the facts which legally excuse protest.

Place of protest. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable.

Protest for better security may be made whenever the acceptor has been adjudged a bankrupt, or insolvent or has made an assignment for creditors before the bill matures.

Waiver of protest. Protest may be waived in the same manner as presentment and notice of dishonor may be waived.

Protest is dispensed with by any circumstances which would dispense with notice of dishonor.

Delay is excused when caused by circumstances beyond the control of the holder. When the cause of the delay ceases to operate, the bill must be protested with reasonable diligence.

Questions and Problems

(264) Why does the law provide for certain steps to be taken to fix the liability of parties secondarily liable upon negotiable paper? What parties are secondarily liable? what parties primarily liable? Why this distinction in their liability?

(265) What is meant by presentment for payment? Is it necessary in order to charge a party primarily liable? secondarily liable?

(266) Upon what date must presentment for payment be made? What is the rule in demand paper?

(267) What will be the date for presentment for payment if paper falls due on a holiday? on Sunday? on Saturday?

(268) At what hour must presentment for payment be made?

(269) At what place should paper be presented for payment?

(270) In what manner is paper presented for payment?

(271) What will excuse presentment for payment?

(272) May the right to have presentment be waived?

(273) What is meant by "dishonor" of a negotiable instrument?

(274) To whom must notice of dishonor be given?

(275) Within what time must notice of dishonor be given?

(276) A mails to B, an indorser, notice of dishonor. The notice is properly stamped and addressed but is lost in the mails and never reaches B. B does not actually learn that the note is unpaid until several weeks later. Can he be held?

(277) At what place should notice of dishonor be given?

(278) Can notice of dishonor be orally given? Suppose that it does not accurately describe the paper, would it be sufficient?

(279) Can notice of dishonor be given to the party's agent? What is the rule where the party entitled to notice is dead? bankrupt?

(280) May notice of dishonor be waived?

(281) When will necessity of notice of dishonor be dispensed with?

(282) What is protest? when necessary?

(283) What are the essentials of protest?

(284) By whom may it be made? at what time and place?

(285) What is protest for better security?

CHAPTER XXXVI

DISCHARGE OF NEGOTIABLE PAPER

MEANING OF DISCHARGE

NEGOTIABLE paper is discharged when by reason of payment or some other fact it loses its effect as a legal obligation. If the paper itself is discharged all parties thereto are thereby discharged of liability thereupon, but certain parties may be discharged while the paper still remains in force as to other parties.

DISCHARGE OF THE PAPER ITSELF

Discharge by payment. The payment by the maker of a note or the acceptor of a bill will discharge the paper because in such case the debtor has paid the obligation and it therefore ceases to exist. If, however, a party secondarily liable pays it, the paper itself is not discharged because that party has the right to sue the parties above him on the paper.

Payment of party accommodated. If a party who is accommodated pays a paper, no matter in what capacity he appears upon the paper, the paper is thereby discharged, for it is paid by the real debtor. Thus, suppose A makes paper for B's accommodation, payable to B and by B indorsed to C. B is here the real debtor and should pay the paper when it matures. If he does so the paper is thereby discharged, notwithstanding he

appears in the capacity of an indorser and A in the capacity of a maker.

By intentional cancellation by the holder. A person who has paper may destroy it or cancel it intentionally, and if he does this the obligation is thereby discharged and he cannot thereafter reconsider what he has done with the effect of recreating the obligation.

By acquisition of the paper at or after maturity by the principal debtor. This amounts to a payment of the paper and therefore discharges it.

DISCHARGE OF PARTIES SECONDARILY LIABLE

In general. A party secondarily liable may be discharged from liability on the paper while the paper itself remains in force and effect.

In fact we have seen that the holder must take affirmative steps to fix upon the party secondarily liable his liability. The most common cause of discharge of a party secondarily liable is the failure to present for payment, give notice of dishonor and have the instrument protested as we have heretofore seen, but the party secondarily liable may be discharged in other manners, which we will briefly intimate.

Party secondarily liable discharged by failure to properly present for payment, give notice of dishonor and make protest. These steps we have considered at length elsewhere.

Intentional cancellation of signature by holder. If the holder intentionally strikes out the signature of anyone secondarily liable, such party is thereby discharged.

By valid tender of payment by prior party. A party secondarily liable will be discharged from his liability

to the holder if some party prior to him has made a valid and sufficient tender of the amount due, for the simple reason that if the holder at one time could have secured the payment of the paper by taking a properly made tender of the amount due, he cannot now hold a party who is only secondarily liable. The loss is the fault of the holder and should not be fastened upon any indorser or drawer.

By release of principal debtor. If a holder releases a principal debtor he thereby will release the party secondarily liable unless he expressly stipulates against this.

By extension of time of payment. If the holder extends the time of payment without the consent of the party secondarily liable, he will release the party secondarily liable unless he expressly reserves his right against him. This does not mean that the mere failure to bring suit when paper is mature will operate to discharge the party secondarily liable, but means that if the holder by agreement expressly extends the time of the paper, the indorser may say that if such extension had not been made the paper might have been paid. Therefore he should not be made to suffer.

Questions and Problems

(286) What is meant by discharge of negotiable paper?

(287) In what ways may paper be discharged?

(288) In what ways may parties liable upon paper be discharged?

PART VI

BUSINESS ASSOCIATIONS

CHAPTER XXXVII

PARTNERSHIPS — THEIR NATURE AND FORMATION

PARTNERSHIP DESCRIBED

Business associations. To conduct a business of any considerable magnitude requires combination of effort. Experience has suggested three general classes of co-operation in business endeavor: (1) through the device of agency; (2) through association in common ownership, known as partnership; (3) through the medium of an artificial person, known as a corporation.

The law of agency we have thought profitable to discuss in a former part of this book as having a large application and a more fundamental bearing in the fact that whatever one may do he may do through another, be it an isolated act or a line of business. One seldom carries on a business merely by the establishment of agencies, and on the other hand, men who form partnerships or corporations have need of agents to represent such partnerships or corporations.

The uniform partnership act. A law to make uniform the law of partnership, has been recommended to the various states for passage by the Commissioners on

Uniformity of State Legislation; and it has been adopted in a number of states. It preserves the common law theory of a partnership as a collection of individuals under an agreement for coöperation in business for profit rather than an entity, but it allows real estate to be held and transferred in the partnership name and makes an incoming partner liable for past debts of the firm. Both of these are innovations in the law of partnership and are upon the entity theory.

Partnerships defined. A partnership may be defined as an association of two or more persons, formed to carry on, as co-owners, a business for profit. It will be noticed in this definition that a partnership is merely an association, not, like a corporation, having separate legal existence in itself as a unit. It will be further noticed, and we shall understand more fully hereafter, that the members of the partnership are mutual owners of the business, each one being of equal dignity and importance with the others. In the third place, we notice that the enterprise must be conducted with a view to profit. Associations, clubs, lodges, and mutual benefit associations of all sorts are not partnerships.

Sharing in profits not enough to create partnership. A partnership must be with a view to profit, but an association formed for the purpose of sharing in profits is not necessarily a partnership. It was at one time held that if parties were associated together under an agreement to share the profits of the enterprise, they were partners, and that if loss occurred each would have to stand his share of such loss as a partner in the venture. But as further cases came before the court, it

was found to be unsound and unjust to apply such a test, and the law developed to the effect that in order to constitute a partnership there must be more than a mere arrangement to divide the profits; there must further be an intention to have a mutual ownership of the business carried on by the parties for mutual profit. A few examples will make clear the fact that the mere arrangement to share profits does not create a partnership, and therefore the losses, if they occur, cannot be put upon all of the parties.

Example 140. A has a factory for the manufacture of machinery. He desires a manager and offers B a position under a contract that B shall have one half of the net profits. B undertakes the duties and the concern enters into various contracts. A creditor sues A and B as partners. B is not liable in such a suit and the case must be dismissed as to him unless the parties had made representations by which creditors would naturally believe that they were partners. Something more is needed here to create B a partner in this venture. He is like any other employee except that his compensation depends upon the amount of profit, but it is contrary to the intention of the parties that he should be held for any losses.

Example 141. A owns property and rents it to B under a contract by which B is to pay A as rent one fourth of whatever profits B shall make in his business. In this case both parties are interested in the profits of the enterprise, but they are not partners as B is the sole owner of the business and A has absolutely no interest or control therein. A would not be responsible for B's debts, nor could A be made to account to B for any share of losses which might occur.

These examples and others that might be given in other situations illustrate the fact that profit sharing, while an essential element in a partnership, is not in

itself enough to impress upon a business arrangement the character of partnership.

Partners are mutual owners. The true test of a partnership is determined by the question whether the alleged members have made a contract by which they intended to associate themselves in business as mutual owners of that business with a view to profit. If they have done so they are partners and not only entitled to share in the profits, but must mutually sustain losses in such proportion as between themselves as they have agreed upon, although as to third parties, each one is personally liable for the entire debt.

> **Example 142.** A has $5000 idle money. B owns a dry goods store and C is an expert dry goods salesman. A proposes that the three go into the dry goods business together under the firm name of A, B and C; A to contribute $5000, B to contribute his stock in trade and C to contribute his services; all to share equally in the profits. The firm enters in business, employing clerks and agents. Debts are created and the firm fails. B and C become individually insolvent. A, who is a capitalist, can be made to pay all of the debts of the firm. The same would be true of B or C were either of them the solvent party. Were A, B and C all solvent after the failure of the firm they would as to each other have to share equally in the losses. Had A and B merely employed C upon a salary, or even upon an agreement to share in the profits, C would not have been a partner in the firm so long as there was no intention to constitute him a mutual owner having a voice in the affairs of the firm and a principal's interest therein.

As a result, partners all liable as principals. Because the partners are co-owners of the business as a result of the carrying out of their intention to be such co-

owners, each one is a principal in the business and liable as a principal for all acts done, contracts made and debts incurred by himself or his associates for the benefit of the partnership and within the actual or apparent scope of the partnership activity. This will be more fully discussed under the subject of the authority of the partner.

Partnerships as to third persons. In the discussion of agency we noticed that a person may be bound as principal by the act of another person as his agent in cases in which he has acted in such a manner as to create a reasonable basis for a belief that such other person is his agent, though in fact he is not. The same rule obtains in regard to the law of partnerships in which members are agents of each other. One may be held for the debts of another as his ostensible partner when as between the parties no partnership arrangement exists. This is variously called partnership by estoppel, partnership as to third persons, ostensible or apparent partnership. It is only a further extension of the principle that holds one who is actually a partner for acts of his copartners which are in excess of their real authority, but not of their apparent authority.

Partnerships are on personal basis. It is elementary in the law of partnerships that the relationship is purely personal. A person will not be forced into a partnership with another. Right to choose the associate is fundamental. This doctrine is expressed in the words "*delectus personæ.*" On account of this doctrine, an attempted transfer by one partner of his share without the consent of the other member or members of the firm cannot operate to confer upon the transferee any

right to be a member of the firm. Corporations differ in this regard. Shares in them are freely transferable and death of a shareholder does not affect corporate existence.

KINDS OF PARTNERSHIPS

Limited partnerships. A partnership is said to be limited when under the operation of some statute it is permitted to have members whose liability to creditors is limited to an amount subscribed. Such partnerships are not common, as incorporation is usually resorted to in cases in which liability is sought to be limited. Formation of a partnership under such a statute requires strict compliance with the terms thereof as to publication, recording Articles of Partnership, etc.

An act to make uniform the law relating to limited partnerships has been adopted by the Commissioners on Uniformity and has already been adopted by some of the states. This act provides that a limited partnership shall have one or more limited and one or more general partners. It provides that such a partnership may be formed by the execution of a certificate setting forth the name, business, place of business, the name and residence of the partners, designating which general and which special, the term, the amount of cash and the agreed value of other property contributed as capital, and other provisions. This certificate must be properly recorded. The rights and powers of the members of the firm are indicated, but it is not advisable for us to inquire into them at length here.

Joint stock companies. A joint stock company is a company whose organization is similar to that of a corporation, except that it has no charter from the state.

It is in substance a partnership, and its members are liable to creditors as partners notwithstanding they may be thereby compelled to pay more than they have subscribed.

Example 143. A, B and C decide to form a business to which each is to contribute the sum of $5000, and which shall be governed by a set of by-laws, which provides for the issue of transferable shares to each subscriber, that no subscriber shall be liable for more than the amount for which he subscribes and that there shall be officers known as President, Secretary and Treasurer. No attempt is made to secure a charter from the state under the incorporation law. The firm becomes heavily indebted. Its creditors may sue the members as their debtors and enforce liability against any member as in ordinary partnership cases, leaving such member to have his contribution from the others, as he may be able to secure it.

KINDS OF PARTNERS

An ostensible partner is a person who allows himself to be held out as a partner, and may be really a partner or merely an apparent one. He is also called an *apparent* partner. Such persons are liable to creditors who rely upon the appearance of partnership whether the partnership is actual or merely apparent.

A silent partner is one who has no voice in the firm. He may be apparent or secret.

A secret partner is one, whether silent or not, whose connection with the firm is kept secret by himself and the firm. He is liable to creditors if they discover his true relationship to the firm, but only to creditors who become such while he is actually a partner.

A dormant partner is one who is both secret and silent.

THE PARTNERSHIP CONTRACT

In general. As we have seen from the definition of the partnership, it is a relationship arising out of contract. It has no charter from the state, and comes into being by mere agreement and may be dissolved at any time by mere agreement. It is not essential, although highly advisable, that the contract be in writing. It is not infrequent in smaller ventures that the parties have no written contract, merely an oral understanding to share profits and losses.

The Articles of Partnership. The written agreement of partnership between the parties is formally known as the Articles of Partnership. It sets forth that the parties have agreed to form and do thereby form a partnership for purposes named, under a certain firm name or style, with the duration, the capital to be contributed by each, the manner in which it may be contributed (whether in money, property or services), the times and manner of dividing profits, the limitations, if any, upon the powers of particular members, the manner and effect of dissolution and such other items as may be desirable in any particular case.

THE FIRM NAME

What firm name may be. The firm name may be any name agreed upon by the partners, whether fanciful or not. It may include the names of any of the partners, or all of them, or none of them. It may, unless there is a statutory law forbidding, be purely fanciful and of the kind usually adopted by corporations. Thus, "Brown and Co."; "The General Tea Store";

"The John Brown Company"; "Smith, Jones and Brown Tea Store Company," would all be good partnership names no matter how many partners may exist in those firms.

Statutory provisions as to name. Some states have statutory provisions as to names which must be observed. For instance, in several states if a partnership name does not disclose the names of all the partners, the names of those partners must be publicly recorded.

The name as property asset. Every person knows that the name of a company, incorporated or unincorporated, may be its most valuable asset. That name may become the identifying label of the good will of the firm. Destroy all of its tangible assets and yet its most valuable asset — its name — would remain and enable rebuilding of its business comparatively easily and in a short time. The integrity of the firm, its reputation for honesty, fair dealing and other qualities, the habit of customers in trading with it, are all protected by its name. Accordingly a court of equity will prevent by injunction the usurpation of its name by competitors who thereby strive to acquire a part of its trade.

THE FIRM CAPITAL AND PROPERTY

Capital defined. The capital of the firm is the amount of money or property put in the firm by agreement, as the fund with which it is to carry on its business. Technically the terms "firm capital" and "firm property" are not synonymous, as, strictly speaking, "capital" is contributed wealth for the purpose of creating property and money with which to carry on business, while

"property" is anything which may be owned by the firm.

The subjects of Interest upon Capital, Rights upon Dissolution, and the like, are considered elsewhere.

What constitutes firm property. Anything is firm property which is purchased with firm funds or contributed from any member. It may consist in real estate or chattels or money. For legal reasons, and with results we cannot inquire into here, all property of the firm is considered for firm purposes to be in the nature of personal property.

Nature of partner's interest in firm property. The partner's interest in the property of the firm is in the nature of a common ownership peculiar to itself. He has no ownership to any particular part of the property to the exclusion of the other members of the firm. They all, together, own it, and the right of each partner upon dissolution is not to have any particular property, whether he originally contributed it or not, but to have his share of the surplus, if any, after the partnership debts are paid.

The Uniform Partnership Act deals with the subject of partnership real estate specifically. It makes some changes in the common law and calls the tenure tenancy in partnership. It recognizes ownership of record in the partnership name, which is a novelty in the law of partnership; but the scope of our text will not permit discussion of this point.

Questions and Problems

(289) What are the three general forms of business association?

(290) What is the Uniform Partnership Act? Explain its

origin and purpose. What other uniform laws have been drafted covering subjects so far covered in this work?

(291) Define a partnership.

(292) Must a partnership be a venture for profit? Will a mutual interest in the profits of any venture create in itself a partnership? Why?

(293) A, desiring more capital for his retail hat business, applies to B for funds. After discussion B agrees to let A have $5000 if A will pay him 5 per cent of the net profits of the business for the use of the money. C afterwards sells goods to A, who, before paying C, fails in business. C then learns for the first time of the arrangement with B, and now seeks to hold B as a partner. Is B liable to C? Why?

(294) State Example 140.

(295) State Example 141.

(296) What is the true test of a partnership?

(297) If A, B and C are partners, upon what theory is A responsible for what B does in the line of the partnership business?

(298) What is partnership by estoppel or as to third persons?

(299) Define a limited partnership. What law has been drawn up to cover the subject?

(300) Define a joint stock company. Suppose that a hundred persons form such a company with by-laws which set forth that the members shall not be liable beyond the amount subscribed by them. The company fails. Are the individual members liable to creditors beyond the amount subscribed by them?

(301) Define ostensible partner; silent partner; secret partner; dormant partner.

(302) What are the "Articles of Partnership"?

(303) Must the partnership include the names of all the partners?

(304) What is the firm capital? How does it differ from the property of the firm?

CHAPTER XXXVIII

PARTNERSHIPS (CONTINUED). RIGHTS OF PARTNERS AMONG THEMSELVES

GOOD FAITH BETWEEN PARTNERS

General statement. A partnership is founded upon the basis of personal confidence. One can readily understand the fact that entering into a partnership with another is an act involving the closest communication, personal contact and opportunity to use one's position for great benefit or great harm. Clearly one would not enter a partnership with another unless he had the highest faith in that other's honesty and straightforwardness. Because this is the prime requisite in fact, it has been made the prime requisite in law. It is fundamental that the partners must observe good faith toward each other, and we will see in the following paragraphs some of the commoner applications of this rule.

Partner cannot compete. One partner cannot compete with the firm without the consent of the other partners. If a partner were allowed to compete with his firm the temptation would be to oppose his own interests to those of the firm and make the entire profit in any transaction for himself rather than bring it in as a partnership act involving the division of the profit with others. Consequently, if one partner attempts to com-

pete with his firm the law will consider that the act done by him in competition was really done for the benefit of the firm and will give to the partnership all the benefit of that act. But if, in his attempt at competition, he loses money, inasmuch as he is engaged in wrongdoing he must bear any loss that occurs. Furthermore, a court of equity will enjoin a partner from further acts of competition with the firm.

Partner's right to deal with firm. The partner has no right to buy from the firm or to sell to the firm except upon the knowledge by the other members of the firm that he is so acting. For if he were allowed to sell to the firm without the knowledge of the firm that he is the seller, his temptation would be to get the highest price possible. So he cannot buy from the firm for the reason that his temptation would be to buy at the lowest price possible. Sales are often made by partners to partnerships, and by partnership to partners with the consent of the other members of the firm, but secret dealings of this sort are not allowed.

Partnership benefits acquired by partners. Any benefit to which the partnership may be entitled cannot be acquired by a partner against the wishes of his associates. Anything acquired by him which may be rightfully considered a partnership right will be declared by the court to be held by the partner for the benefit of the partnership.

RIGHTS OF COMPENSATION — INTEREST, ETC.

Right to interest on capital. Capital is put into a partnership not as money loaned but for the purpose of securing profits in lieu of the interest which one might

obtain by loaning his money. Accordingly a partner cannot claim interest upon his money. True, if he loans money to the firm, he may contract for interest the same as any other person, but he cannot expect to have both his chance of profit and right to interest upon his money invested by him as principal.

Right to compensation for services. While it is frequently agreed that one partner may have a certain amount of compensation from the firm in consideration of giving his services, in addition to the profits or dividends which the business is expected to pay, there is no right to compensation for services to be implied, for it is assumed that the partner is putting in his efforts in expectation of his share of the profit which he hopes to realize from his efforts.

Questions and Problems

(305) Why is a good faith between partners regarded as so essential?

(306) A, of the firm of A, B and C, sets up a competing business. He makes a profit. What can B and C do?

(307) Has the partner a right to deal with the firm? Explain.

(308) The firm of A, B and C operate a hotel with a lease expiring upon the same date affixed in the partnership articles as the time to which the partnership will run. A secretly renews the lease. B and C bring suit to have it declared for their common benefit. What will the court decide? Why?

(309) Has a partner a right to interest on capital?

(310) A firm is composed of A, B and C. A has contributed capital, but is not expected to give his services. B and C are to contribute their services. B puts in the hours required of him, but C devotes much more time and mainly by his efforts makes the business a success. B claims a salary. C also claims a salary. Is either entitled thereto?

CHAPTER XXXIX

PARTNERSHIPS (CONTINUED). RIGHTS OF THIRD PERSONS

GENERAL STATEMENT

The partner an agent. In our discussion of the nature of partnerships we took occasion to notice that each partner is an agent of the others and acts upon their behalf as well as for himself whenever he assumes to act in furtherance of the firm's business, and therefore has a very large ostensible authority to represent the firm. He is not only an agent but he is also a principal, and he may do practically anything that all of the members acting together could do in the prosecution of the firm's business so long as he keeps within the general lines of that business as conducted by the firm. His authority may be limited by contract, but unless this limitation is known to the third person such third person would not be bound thereby, if the circumstances were such as to justify a reasonable man in the belief that he was a partner with the usual partnership authority.

Trading and non-trading partnerships. A partnership is said to be a *trading* partnership when it buys and sells either in the crude or finished form as its main activity. Otherwise it is called *non-trading*. Most partnerships are trading partnerships. The importance of the

distinction lies in the fact that in a trading partnership, authority to represent the firm implied from the nature of the partnership is much greater than in the case of a non-trading partnership. This arises from the fact that the business of buying and selling requires the exercise of many acts which are necessary or reasonable means to that end. One who buys and sells must be able to extend credit, buy on credit, give, indorse and accept commercial paper, make warranties and so on. Hence a partner in a trading partnership will be deemed to have such powers to bind his other partners unless it is known that he has been deprived of them. In a non-trading partnership powers that incidentally go with buying and selling will not be inferred. But nevertheless in any particular case, the authority of this nature may actually exist or apparently exist from the past conduct of the firm. It would be a question of fact in each case.

AUTHORITY OF THE PARTNER TO DO SPECIFIC KINDS OF THINGS

Power of partner to buy and sell. A partner in a trading partnership has the ostensible authority to buy and sell all of those things in which the firm is accustomed to deal. It would not be practicable to call together all the members of the firm every time a bill of goods was to be bought or sold. It is therefore fundamental that each partner may act as the agent of the others and in his own behalf in purchasing and selling those things which fall within the general lines of the partnership business as carried on. But this right to buy and sell would extend merely to stock in trade and not to

permanent and important items of the firm property used for the purpose of carrying on business of the firm.

Example 144. A, B and C are partners in the business of conducting a dairy having ten cows, used for dairy purposes. A here would have the ostensible authority to buy food for the stock, to contract for pasturage and all things necessary from time to time for the proper operation of the business. He would also have the right to sell milk and butter and any other item which might be within the scope of the firm business. Suppose, however, he sells to D without the consent of the other partners, one of the cows. B and C can object to this sale and can have it set aside. Similar illustrations might be given from any sort of partnership. Of course any unauthorized act by one partner could be ratified by the others upon learning of it.

Right of partner to sell and buy upon credit. A partner has the ostensible authority to buy and to sell upon credit, making such terms on credit as are customary among business men in that line of business.

Right of partner to bind the firm on negotiable paper. As a partner has the righ to buy and sell upon credit, he must have the right to do those things which are incidental thereto, such as binding the firm upon negotiable paper. His power to bind the firm upon negotiable paper would depend upon the purpose for which he signed the firm's name. He has no ostensible authority unless it has been given him in any particular case to bind the firm upon paper given him for some unusual commission outside of the general conduct of the firm's proper business.

Example 145. A, B and C are partners in the grocery business. A buys groceries from D on sixty days' credit and makes a promissory note in payment, due in sixty days, signing the

firm's name to the note. He also goes to E and requests the loan of the sum of $1000, representing that it is for the benefit of the firm, and gives his note to E for $1000. He takes the goods which he buys from D and sells them to F for cash and puts the money in his own pocket, the goods having never come into the partnership stock. He also takes the $1000 and puts it in his own pocket and absconds. D sues the firm upon the note given for the goods. E sues the firm upon his note. D can recover even if A was acting without actual authority and even against express directions. But E cannot recover unless he can show that B and C actually authorized A to borrow this money, for a partner has no right to do an unusual act of this sort under cover of ostensible authority. If, however, E had sold the note to G before maturity and for value without notice of the circumstances, G would have the right to assume that the note had been given for the purchase of goods or for some other proper partnership purpose and could as an innocent purchaser hold the other partners upon the note.

LIABILITY OF PARTNER FOR TORTS OF CO-PARTNER

Each partner is liable for the torts of the other partners which are committed as a part of some act done in furtherance of the firm's business. The reasoning here is the same as that which governs the law of principal and agent. Each partner being an agent of the other partners for the purpose of carrying on the firm's business may make the other partners liable for any tort committed within the scope of his authority.

LIABILITY OF INCOMING, OUTGOING AND SECRET PARTNERS FOR ACTS OF CO-PARTNERS

Incoming Partners. An incoming partner is not liable for any existing debts of the firm unless he assumes

liability as a part of his contract. He will, of course, be liable as an existing partner for all of those debts which are contracted after his entrance into the firm, and this would be true whether he was known by the creditor to be a partner or not. The Uniform Partnership Act creates in this respect an innovation. It provides that where a new partner is admitted into the firm, then if the business is continued without liquidation, creditors of the former partners are also creditors of the new firm.

Outgoing Partners. A partner leaving the firm continues liable for all of the debts of the firm which were created during his connection with it, and he also continues liable for the debts created after his leaving the firm to all of those who have received no notice of his departure and who trade with the firm upon the assumption that he is still a member. Accordingly, it is essential to the cessation of his liability that notice be given that he has left the firm. To all those who have dealt with the firm during his connection with it, actual notice must be given. To those who have not dealt with the firm, notice by publication must be given. Actual notice is given usually by means of a letter sent to all of those who have dealt with the firm, and at the same time a notice should be published in some newspaper setting forth the fact that he has severed his connection with the firm. Any actual notice, no matter how received, would be sufficient to stop future liability.

Secret Partners. A secret partner is liable to creditors for all those debts contracted during his actual connection with the firm for, inasmuch as he is a real party at interest and takes the benefit of the firm's

business, he ought to be compelled to assume the burdens incidental to membership in a partnership. But if he leaves the firm, he is not liable for debts thereafter contracted, whether or not he has given any notice, for future creditors, not knowing of his connection with the firm, cannot claim that they traded with the firm upon the faith of his connection with it. Consequently, the notice mentioned in the last paragraph is not necessary in the case of a secret partner, but it should be given to any particular persons who might have learned of his existence in the firm.

Questions and Problems

(311) State in general the authority of the partner to represent the firm.

(312) State the distinction between trading and non-trading partnerships. What is the importance of the distinction? Name some non-trading partnerships.

(313) State Example 144.

(314) State Example 145.

(315) What is the liability of a partner for the torts of the co-partner?

(316) Is an incoming partner liable for the past debts of the concern?

(317) Does an outgoing partner remain liable for those debts created during his interest?

(318) If one is really a partner but not known to be such, is he liable to creditors for debts created during his interest? Why?

CHAPTER XL

PARTNERSHIPS (CONTINUED). REMEDIES OF CREDITORS

PARTNERSHIP CREDITORS

Right to follow assets of any partner. The creditors of the partnership have the right not only to seize by process of law the assets of the partnership, but they can satisfy any judgment obtained by them by levying execution upon the property of any member of the firm, although it may be totally unconnected with the partnership business, leaving the partners to work out their mutual equities among themselves.

> **Example 146.** A, B and C form a partnership. The firm incurs a debt to D, which remains unpaid. D brings suit against A, B and C as partners and secures a judgment against A, B and C. C has an automobile which he uses for pleasure. D can secure satisfaction of his judgment against A, B and C by levying upon this automobile.

This example illustrates the principle which we discussed at the beginning of this subject, that a partnership is not in law a legal unit separate from its members as a corporation is, and that each partner has an individual liability for the debts of the firm. It would not be necessary for D to show in the above case that the partnership is insolvent, or that A or B are insol-

vent, although that possibly would usually be the fact, as the debt would be paid, especially after a judgment were obtained, unless insolvency of the firm forbade. It is also true that if the firm were insolvent it might be put into bankruptcy. But unless C were also in bankruptcy the proceedings would not affect D's right to proceed against C's individual assets.

Rights in a court of equity. If the assets of the firm and the assets of the individual partners are in a court of equity for dissolution purpose, the creditors are then put upon a just and equal basis in their rights to share in the partnership and individual assets. A number of rules have been applied to this situation which we cannot here discuss fully. The general rule is that the creditors of the partnership must prove up against partnership assets, and the individual creditors against individual assets until the exhaustion of the particular class of assets involved, whereupon they will be entitled to prove up equally with the other class of creditors.

CREDITORS OF PARTNER

No right against other partners. A creditor of one of the partners of the firm has no right, of course, to prove his claim against any other partner of the firm, or to have any access to that other partner's property.

Right against partner's interest in the firm. A creditor of an individual partner has a right to seek satisfaction of his judgment out of any of the assets of the debtor wherever he may find them. The partner's interest in a partnership is an asset and may accordingly be reached by judicial process. The creditor's realization of his claim in that case is not by taking any partic-

ular property out of the partnership property, for the partner's property in the firm consists in his right to his share of the surplus, if any, after all of the debts are paid. Therefore the creditor could simply have A's interest in the firm sold for whatever it might be worth.

Questions and Problems

(319) State Example 148.

(320) In a court of equity what rule will prevail as to disposition of assets among creditors of the firm and creditors of individual partners?

(321) A, of firm of A, B and C, owes D $1000 for a purely personal matter. Can D hold B or C? What can D do?

CHAPTER XLI

PARTNERSHIPS (CONTINUED). DISSOLUTION OF PARTNERSHIPS

CAUSES OF DISSOLUTION

In general. The causes of dissolution may be classed under three headings.

(1) Dissolution by act of parties;
Lapse of time;
Mutual agreement;
Transfer of partner's interest;

(2) Dissolution by operation of law;
Death of partner;
Bankruptcy;

(3) Dissolution by judicial proceedings;
For misbehavior;
For failure of enterprise;
For incompetency of partner.

Dissolution by lapse of time. If the partnership agreement sets forth a specific time for the endurance of the partnership relation, the lapse of that time will not in itself terminate the relationship, as the concern may nevertheless go on indefinitely thereafter or by definite agreement to renew; but it would, of course, give any partner a right to withdraw and to have the concern wound up.

Dissolution by mutual agreement. Whether arrangement has been for a definite time or not it needs no more than to be stated that at any time all parties concerned may agree to bring the firm to an end.

Dissolution by transfer of partner's interest. This principle has already been considered. A partner has no right to sell out to a stranger or even to an already existing partner without the consent of every member of the firm. Such transfer by him effects a dissolution of the firm; although the remaining partner or partners may choose to go on in a new partnership with the transferee.

Dissolution by death of partner. The death of a partner effects an immediate dissolution of the partnership. The surviving partner is under an immediate duty to wind up the affairs and account to the executor or administrator of the deceased partner, and for this purpose he succeeds legally to all the assets of the firm, and has the right, duty and authority to wind up the business and to account to the personal representative for the share of the deceased partner.

Bankruptcy of the partnership or any of its members results in a dissolution of the firm. If the partnership is bankrupt, the business must be wound up and distributed among creditors, according to the law of bankruptcy. If any member becomes bankrupt, his interest in the firm passes to the trustee and therefore the firm is dissolved.

Dissolution by court decree. A court of equity has the power to dissolve a firm upon the application of any member thereof and against the wishes of the other members, for any good cause shown. Among such causes are: (1) Financial failure of the firm with no

relief in sight; (2) Inability of the partners to work compatibly with each other, being constantly at variance on vital matters of management; (3) Physical or mental incompetency of any member of the firm.

DISPOSITION OF ASSETS UPON DISSOLUTION

Where firm solvent. In the case of dissolution of a solvent partnership the liquidation should be as follows:

(1) Payment of debts to non-members of firm;

(2) Payment of debts to members of firm;

(3) Repayment of capital in the proportions to the respective contributions, the members who have contributed nothing but services, time or skill being not entitled to any portion of the capital;

(4) Division of the surplus among the members of the firm in proportion to their interest in the firm; it being presumed in the absence of agreement that all are interested equally no matter what the contribution of capital or whether any capital was contributed by them or not.

Example 147. A, B and C are partners, A contributing $10,000, B $5000 and C his time, services and skill. The firm dissolves with assets of $25,000 and debts of $5000, including $2000 loaned by A. The division should be as follows:

(1) To the non-member credit $3000;
(2) To A the repayment of his loan of $2000;
(3) Repayment to A and B, $10,000 and $5000 respectively;
(4) Division of the remaining $5000 among A, B and C in equal parts unless by agreement their interest in the firm has been declared to be unequal.

Questions and Problems

(322) How may a firm be dissolved? Discuss each item.
(323) State Example 147.

CHAPTER XLII

CORPORATIONS DEFINED

The corporation a legal person. A corporation is often spoken of as an entity, a word defined as "a real being whether in contemplation or fact." We may, then, think of a corporation as "a real being, in contemplation of law." It is a being, an *artificial person* created by law, having a complete existence in itself as a unity. A partnership is a relationship among individuals. A corporation in the eyes of the law *is* an individual. The individuality of its members is distinct from its own. It may own property, buy and sell, contract, commit torts and crimes, sue and be sued.

The laws which apply to "persons" are always regarded as applicable to corporations, unless it is otherwise stated or unless in the nature of the case only natural persons could have been meant.

> **Example 148.** A law provides that any *person* who shall employ a child under fourteen years of age in a factory shall be guilty of a misdemeanor. A corporation employs a child under that age. It may be punished under the law. (The Overland Cotton Mill Co. *v.* The People, 32 Colo. 263.)

The corporation's separate existence criticized. It is sometimes said that the theory of a corporation as having an existence apart from its members is a mere fiction and after all it is but an aggregation of individ-

uals. This criticism is untrue. The very critics who make such statements then proceed to discuss its power to make contracts, own property, sue and be sued as a person, and to set forth that its members are not liable individually for its contracts and debts and have no legal ownership of its property. It is true that the theory of corporate existence will not be allowed by the court to cover up fraudulent and criminal conduct by individuals, but this is far from saying that the corporation so used as a cloak for fraud has no legal existence for proper corporate purposes. A corporation is truly, for all purposes contemplated by the law creating it, a *legal person*, existing as such by contemplation of law.

Powers of a corporation in general. A corporation being a legal person may be said generally speaking to have two broad classes of powers, as follows:

(1) Powers inherent in its existence as a corporation:

(*a*) Power to sue and be sued;

(*b*) Power to own property and acquire and transfer it;

(*c*) Power to contract;

(*d*) Power to commit torts and crimes;

(*e*) Power to make by-laws, have a seal, etc.

(2) The powers specifically given it in its own particular charter.

A charter essential. A corporation can have no existence without a *charter*, which may be defined as a franchise from the state to exist as a corporation. A, B and C may agree among themselves to be a corporation, but their act is vain unless they have a charter from the state creating D, an artificial person. What they do without such charter is done by *them* and they are responsible.

Corporations *de facto* and *de jure*. Sometimes the impression is gained from the distinction drawn between corporations *de jure* and those *de facto*, that a charter is not essential. This impression is fundamentally false. A corporation *de facto* is a corporation with a charter, a real corporation, which in some respects has not fully complied with the law relating to the formation and existence of corporations. A corporation *de jure* is a corporation which has fully complied with such law. The purpose of the distinction is merely this, to establish that if there has been a *bona fide* attempt to secure a charter, and one has been secured, and action has been taken under it, the acts of the supposed corporation cannot be said either to be void or to be the personal act of its members merely because some act required by law may have been overlooked or neglected. The *state* through its attorney general may complain and require compliance, but individuals with which it deals can take no advantage of it. As to them it is a complete corporation if it is *de facto*.

The purposes of incorporation. A corporation may be created for all or some of a great variety of purposes. We may briefly enumerate them, and the student will therein see the distinction between a corporation and a partnership, and also more fully appreciate the nature of a corporation.

(1) Convenience in having a separate organization which can in itself hold title to property, make contracts, etc.

(2) Convenience in making possible the unification under one management of many interests. (In a corporation there may be thousands of stockholders.)

(3) Making existence permanent regardless of the changes by death of the members or the transfer *inter vivos* of their shares.

(4) Facilitating transfer of interests by the transfer of the certificate of share.

(5) Limiting the liability of the member for the debts of the corporation to that which has been subscribed by him.

(6) Cutting off the power of any member to represent the other members as their agents. A member in a corporation is not for that reason an agent either of the other shareholders or of the corporation. In a partnership, all are agents of each other.

(7) Securing capital from those who contribute because they appreciate the limitation of their liability and the organization possible in corporate form.

To these we could add others but they would be but adaptations or variations of some of those above.

Kinds of corporations. Corporations may be classified as follows:

(*A*) Public corporations, or those which are founded by the government for corporate purposes.

(1) Municipal corporations as cities and towns.

(2) Quasi-municipal, as counties, boards of education, park boards, etc.

(*B*) Private corporations, or those which are owned by private individuals, even though of a public nature.

(1) Stock corporations, or those which are organized for the purpose of financial profit. Here we place corporations of a strictly private nature as well as railroads and all public service corporations having privately owned capital stock.

(2) Non-stock corporations, or those not organized for private profit.

(*a*) Religious corporations.

(*b*) Charitable corporations, lodges, institutes of learning, pleasure clubs, etc."

(Quoted from Bays's *Cases on Business Law.*)

The status of a corporation outside of the state creating it. A corporation, being a creature of law, can have no rights outside of the limits of the legislative jurisdiction in which it is created except upon the principles of comity. If a charter is granted under the laws of Illinois, to a company, the corporation thereby created is created by the laws of Illinois which are in force over the territorial limits of Illinois, but not elsewhere. Whatever rights such corporation has in another state are to be determined by the policy and laws of that state governing corporations of other states.

A corporation is described as " domestic " when chartered under the laws of the state in which it is operating; it is called "foreign" as to any other state when seeking to operate in that other state. Thus an Illinois corporation is domestic in Illinois; but to Indiana it is a foreign corporation.

It is the policy of all the states to permit foreign corporations to enter and carry on business within the limits of the state through the principle of comity; imposing upon such corporations restrictions thought advisable according to the public policy of the state. All states have foreign corporation laws admitting corporations from other states to operate within their territorial limits upon compliance with the conditions set forth in the statute. These conditions are, generally speaking,

the filing of certain papers, as a certified copy of the charter, a certificate of the amount of capital to be used in the state, and the payment of certain fees.

The federal constitution delegates to the federal government the right to regulate interstate commerce. This forbids interference by the states even when (except on matters in which there must be local regulation) Congress has not acted. For this reason, the foreign corporation laws cannot interfere with carrying on within the borders of the state by foreign corporations that which is properly interstate commerce. Foreign corporation laws also usually merely forbid the "transacting of business" within the state. The courts construe this not to mean acts of isolated nature, such as borrowing money, or selling a certain parcel of real estate. So it does not mean such acts as bringing suit, defending suits, holding meetings, selling stock, etc. A corporation may do all these things in another state than that in which incorporated without compliance with foreign corporation laws. Comity permits it.

The penalty for non-compliance with a foreign corporation law is that of a fine, and the denial of the right to sue in the courts of the state.

Questions and Problems

(324) What is meant by the statement that a corporation is an entity? Explain in what sense it is a legal person.

(325) What is Example 148?

(326) What two classes of powers has a corporation? Name its inherent powers.

(327) What is a *de facto* corporation? What three things are essential to its existence? What is the importance in deciding that a corporation is at least *de facto*?

(328) State as many reasons as you can think of for the incorporation of a company.

(329) What is a municipal corporation? A quasi-municipal corporation?

(330) What is a private corporation? Give two classes.

(331) A corporation is chartered under the laws of New York. It brings suit in New Jersey against a New Jersey citizen. The citizen claims that it has no existence outside of New York. What should the court hold? Why?

(332) A citizen in New Jersey orders by mail a bill of goods from a New York corporation transacting business in New York. The New York corporation accepts the order and sends the goods by freight to the citizen in New Jersey. Must the New York corporation comply with the New Jersey foreign corporation laws in order to do this if New Jersey objects? Why?

CHAPTER XLIII

CORPORATIONS (CONTINUED). ORGANIZATION

THE CORPORATE STRUCTURE

The charter. The charter is the very basis of corporate existence, the foundation upon which the structure is reared. Formerly charters consisted of special laws enacted by the legislature creating specifically the corporation desired by its sponsors. Such laws set forth the objects of the corporation and constituted the measure of its powers. For instance, Northwestern University (not a corporation for profit) has a charter consisting in a special law enacted by the Illinois legislature.

Special legislation is now entirely forbidden in most states in cases in which a general law is applicable. It is now the policy of the law to enact general corporation laws, with which the incorporators must comply; they are entitled to their charter as a matter of course and of right. The procedure to obtain a charter under such laws is to file a certificate setting forth the things required by the law, as, for instance, the name of the proposed corporation, its capital stock, the number of shares, the par value of each share, the objects of the corporation, the location of its principal office, and other items, varying according to the laws of the different states.

This certificate is upon file in the office of the Secretary of State, and must generally also be filed in the Recorder's office in the county in which the principal office of the corporation is situated.

The by-laws. The corporation must have rules by which rights of members, duties of officers, times of meeting, and other matters incident to the proper government of a corporation may be set forth. By-laws are somewhat similar to the ordinances of a city. They should set forth matters of more or less permanence. They differ from resolutions passed at stockholders' and directors' meetings in that they are in the nature of rules or set forth some action decided upon by the members or directors. The power to enact by-laws is in the stockholders unless the statute confers it upon the directors. It would seem to be more properly in the stockholders as the constituent body of the corporation. But under some statutes the power has been given to the directors.

The stockholders. Those who contribute or agree to contribute capital to the enterprise or who succeed to the interests of such are called stockholders. They are also called members of the corporation. They are its real owners, although in theory of law they do not own it, but merely have a contract relationship with it. A stockholder may become such by original subscription to stock which has never been issued, or may purchase stock which has been issued to another. The subject of stock and its transfer is hereafter discussed.

The stockholders have the right to elect the directors, hold meetings, direct fundamental policies, and apply to the court for protection where the corporation

is in danger from mismanagement. They have a right to dividends out of its profits, but these dividends must first be declared by the directors.

A stockholder has no voice in corporate management except by vote at stockholders' meeting. He has no right to represent the corporation except as authority may have been conferred upon him as it might be conferred upon any other agent. He may contract and deal with the corporation, and sue it and be sued by it as any other individual may. (Shares and their transfer are commented upon later.)

The directors. The directors compose a body (called the directorate or board of directors) which has the power to govern the corporation. They are to a corporation as a city council is to a city, or a legislature to a state. They are elected by the stockholders, and are usually, and under some laws must be, stockholders. In small corporations all the stockholders may be directors.

The directors have the power when sitting as a body to determine the policies of the corporation. Their powers are very great, and except in the matter of fundamental changes, they may practically do anything which the corporation itself may do.

The directors can only act as a board, that is, in meeting assembled. The by-laws usually provide for a regular annual meeting, regular monthly meetings and special meetings called as provided by the by-laws.

The directors of a corporation must exercise sound discretion and the highest degree of good faith. Their office is in the nature of a trust. Any director may deal with his corporation and the contract will be

binding, provided the contract is voted for by the other directors constituting a majority. In other cases the contract is voidable by the corporation. In any case the director must disclose everything known to him material to the contract. The directors elect the executive officers of the corporation. This is one of their most important duties and it is not infrequent to have little else done at an annual meeting than the election of officers and reports of retiring officers.

As the director's office is a personal one he cannot delegate the duties thereof.

The number of directors depends upon the provisions of the by-laws. There should be an odd number, not less than three and as many more as may be considered wise.

The executive officers. The executive officers are elected by the directors. The usual executive officers are those named below.

The president. The president of a corporation is its highest officer in point of dignity, although there may be others who have more actual power than he has. His duty is to preside at meetings of the board of directors and keep a general supervision of corporation affairs. He may be, and very frequently is, the directing figure in the corporation. He is elected by the directors, usually at their annual meeting.

The secretary. The duty of the secretary of any corporation depends very largely upon the nature of its business, its extent and organization. He has all of those duties generally described as secretarial, such as keeping the records of the corporation and the meetings of its directors, sending out reports, giving notices, etc.

The treasurer. The treasurer of a corporation handles its funds, and keeps the financial record. He has no authority by virtue of his office except that which arises out of his fiscal duties.

Other officers. There may be other officers in any corporation, but the three named above are commonly the most important. There may be a chairman of the board, vice presidents, cashier, counsel and other elective officers.

The employed staff. To complete the organization of the corporation is to be mentioned its employed staff, large or small as the case may be. Salesmen, clerks, bookkeepers, accountants, whatever they may be, are employed by the executive officers or those to whom they have given authority to employ help.

Questions and Problems

(333) In what form were early charters?

(334) How is incorporation now accomplished?

(335) What are by-laws? Who enacts them?

(336) What is stock? What is the owner of stock called?

(337) State the rights of stockholders.

(338) Who is a director? What are his powers? State his rights and duties.

(339) Who are the executive officers of a corporation? Define the nature of the office of each.

CHAPTER XLIV

CORPORATIONS (CONTINUED). THE POWERS OF A CORPORATION

THE POWERS INHERENT IN CORPORATE EXISTENCE

In general. We have already referred to and enumerated the most important of these, but a more extended statement remains to be made of some of them.

Power to commit torts. It is now firmly established that a corporation may be guilty of a tort and sued for the resulting damages, just as an individual may. In fact perhaps the largest class of cases in the courts to-day is that made up of suits against corporations for damages arising out of the tort of negligence — personal injury and other tort cases. But a corporation may also be guilty of willful torts, of libel, of deceit, for example. Whenever any agent or servant of a corporation in the scope of his authority or employment commits a tort, the corporation must respond in damages to the person injured thereby.

Power to commit crimes. It was long denied that a corporation had the power to commit a crime, and it is probably true that of some crimes it cannot be guilty — that is to say, of the crimes which are defined as of a personal character, as murder. But corporations have been convicted in our courts of many crimes — criminal negligence, conspiracy, rebating, employment of minors

contrary to law and violations of all sorts of health and safety ordinances.

Power to contract, sue and be sued, own and deal in property. A corporation, out of its very existence as such, may contract, own and deal in property, sue and be sued and do every other act or thing reasonably necessary to effectuate the purposes of its existence. Its power to contract, own and deal in property is, however, limited by the express provisions of its charter.

We may now discuss the powers of a corporation as given or effected by charter provisions. There are said to be two sorts of charter powers, those express and those implied.

EXPRESS CHARTER POWERS

In general. A corporation is a creature of limited powers. Aside from those general powers which every corporation has unless denied, we must find the particular power of any corporation in its particular charter. Its charter is the source and measure of its powers. Any power which it does not possess is technically described as "*ultra vires*" ("beyond the power of"), and an act attempted by it which is not within its power is spoken of as an *ultra vires* act.

Statement of powers. The particular purpose for which a corporation is created should be stated, and the statement should also be general enough not to hamper the corporation in its activities.

IMPLIED POWERS

General rule. A corporation will be held to have all those powers which are to be implied from its express

powers as necessary or reasonably desirable to carry the express powers into execution. The statement of a corporation's powers is necessarily a very brief statement. It would be manifestly impossible to set forth in detail all powers that it shall possess. Having its main objects in view, whatever is done by it to reasonably accomplish those objects is within its charter powers.

Implied power to do all that is reasonable to carry express powers into execution. A corporation may do everything (unless specifically denied by law) to accomplish the purpose of its express powers. An act done by it which as an end in itself might be *ultra vires* becomes proper if it is done as a means of accomplishing its proper purposes.

> **Example 149.** The B Lumber Company desires to sell lumber to M, a building contractor, for use in the erection of a certain building. M is required to furnish the usual contractor's bond signed by an acceptable surety. The B Lumber Company, in order to get the business, agrees to become surety on the bond. Afterwards M defaults and the owner of the building sues M and the B Lumber Company upon the bond. The B Lumber Company defends that it had no power to become surety on the bond as it was chartered to carry on a lumber and not a surety business. This defense would not be good as it became surety on the bond for proper corporate purposes; if it had merely in order to earn a fee been surety upon a bond (as, say, an appeal bond) the act would be *ultra vires*.

Implied power to own real property. A corporation without being specifically authorized in its charter may own all real estate which is necessary for the pur-

pose of providing it with a home and otherwise for carrying on its business. It may also acquire property to hold for its reasonable future development and may also take property in satisfaction of debt. Unless chartered to deal in real estate, it ought not to hold large quantities of real estate merely to make a revenue therefrom or profit thereupon. Its surplus funds should be used for dividends, not for investments not authorized by its charter. It is usually held, however, that the state, only, can question its real estate holdings and can require it to dispose of the excess.

Implied power to borrow money, loan money, subscribe to or own stock of other corporations, etc. A corporation may borrow money for its proper corporate purposes and give mortgages upon its real or personal property in security for the same.

If it is not organized as a bank, a corporation cannot *loan money*, as a rule, for its surplus funds should be used for the purpose of paying dividends. Yet where it is saving money for proper corporate expenditures it could loan out the same on proper security for a short term.

The power of a corporation to *subscribe to stock* or hold stock in another corporation where its charter does not include that purpose is denied. In fact, in some states, the power cannot be expressly given, as many evils have grown out of the ownership or control of stock of one corporation by another.

EFFECT OF *ULTRA VIRES* ACT

In general. We have been discussing the power of the corporation, and found that the extent of its power

depends upon the provisions of its charter. Acts attempted to be done beyond that power are technically spoken of as *ultra vires*. If the corporation attempts such acts, what results follow? Of this we will now inquire.

Right of stockholders to prevent act *ultra vires*. The stockholders of a corporation can by appeal to the courts prevent an act *ultra vires* unless they are estopped by their consent thereto.

Right of either party to an executory contract *ultra vires* to repudiate it. While the rule on this point as held in all states under all conditions cannot be stated in our brief space, it may be generally said that so long as the act which is *ultra vires* is entirely executory and no benefit has been received under it by the party seeking to withdraw, there may be such withdrawal without liability, upon the ground that it is a withdrawal from or repudiation of an act which the corporation cannot bind itself to do.

Same where benefit received. It is the general rule, though not so held in all states, that a corporation cannot after it has received the benefit of a contract, plead *ultra vires* when sued by the other party for its failure to perform.

Questions and Problems

(340) May a corporation be guilty of tort? Give an example.

(341) Can a corporation be guilty of a crime?

(342) What is the meaning of the words *ultra vires*? Explain how any given act may be *ultra vires* in one corporation and not in another.

(343) What implied powers has a corporation?

(344) Explain Example 149.

(345) What is the power of a corporation to own real property?

(346) Can a corporation loan money?

(347) Can a corporation subscribe for stock in another corporation?

(348) A corporation is sued by A upon a contract which he claims he has made with the corporation. The corporation pleads *ultra vires*. State how the court will consider this defense.

CHAPTER XLV

CORPORATE SHARES

SHARE DEFINED

In general. The capital stock of a corporation is divided into units called shares, which are issued to subscribers to the stock or to their assignees according to their respective interests. These shares have a " par " or face value determined by the proportion which the unit bears to the entire capital stock. Thus, if the capital stock (as determined by the provisions of the charter) is $100,000 and the number of shares (also as determined by the charter) is 1000, the par value of a share is $100. The capital stock may be divided into as many shares as thought desirable when obtaining the charter, except that the law may require certain par values, as ten dollars, or a multiple thereof. In practice it is usual to have shares of the par value of five dollars, ten dollars, fifty dollars or one hundred dollars.

It is not necessary, unless a statute so provides (and it does so provide in some states) that all shares be subscribed for or issued. A corporation may be organized with a capital stock only part of which has been subscribed for, the rest held in reserve for future subscribers. Such stock is known as " unissued stock " and is frequently referred to as " treasury stock," but " treasury

stock" is a phrase more correctly used to describe stock that has once been issued and then reacquired by the corporation and for the time being held in its treasury.

The market value of stock is not the same as its par value except by accident. This is the value for which the stock is selling on the market, and that is determined by the public's appraisal of its worth as determined by a variety of items — the tangible assets of the corporation, its earnings, its prospects, its undivided surplus, etc.

The certificate of stock. It is the practice to issue to a stockholder a certificate bearing the seal of the corporation and the signature of the officers empowered by the by-laws to issue such certificates, setting forth the fact that a certain named person is the owner of a certain number of shares of a certain par value. The issuance of this certificate is not essential to stock ownership, but it is a highly convenient thing for the stockholder to have and he is entitled to the evidence of his ownership, and may compel the corporation to issue it to him. In practice it is issued as a matter of course to the stockholder at the time he becomes such.

On the back of this certificate there is a blank provided for use in its transfer.

This certificate is detached from a book of certificates, and a stub from which it is taken provides a record showing the certificate which was surrendered, the new owner and the certificate number.

LIABILITY UPON SHARES

Liability of subscriber. A subscriber to stock is liable to an amount represented by the par value of

the shares subscribed for by him. Thus if a person subscribes for ten shares of stock of the par value of fifty dollars per share, his liability is five hundred dollars. When this has been paid he cannot be called upon to pay any further, no matter how great may become the indebtedness of the corporation. We have already noted that this limitation of liability is one main reason for the incorporation of a company.

Liability of transferee. If A subscribes for stock and afterwards transfers it to B, what is B's liability? This would depend upon the answer to the question whether the stock had been paid and if not paid, whether B knew or should have known of that fact. Stock once paid is paid for all time and as to all holders. But one who knowingly buys unpaid stock becomes liable to pay it.

Payment for stock. Stock may be paid for in money, property or services. When money is the medium of payment, there can of course be no question as to the amount paid, but stock is often paid for in property and sometimes in services. The question then is, has the property been correctly valued? In many states it is provided that the directors may value the property and such valuation if made in good faith shall be conclusive. But even in such a case a manifest overvaluation of property of ascertainable or substantially ascertainable value would be deemed fraudulent without other evidence to show it. Where a corporation is formed to exploit a patent having no market value and no known real value, the matter of valuation becomes a problem because it is desired to issue the patent to the corporation in full payment for a certain amount of

stock. In some states, property of that sort could not constitute payment for stock unless it turned out upon exploitation to have real value; but in other states stock could be paid with such property if the directors acted in good faith.

Stock having no par value. Very recently in a few states laws have been passed providing for incorporation of stock companies without par value. It is claimed for such laws that the evil of overvaluation and of "watered stock" is done away with.

"**Watered stock**" is a term including any stock which does not represent true value or stock liability as where donated for services fictitiously overvalued, or for property overvalued, or where given away. It has been the cause of much evil in corporation practice.

TRANSFER OF STOCK

Stock is transferred by a transfer upon the books of the company accompanied by a transfer of the certificate. In practice, the stock certificate is delivered to the transferee with a power of attorney for the transfer on the books of the company, indorsed upon the back of the certificate. The transferee then presents the certificate to the company, which takes it up and cancels it and issues a new one in the name of the transferee.

Questions and Problems

(349) What is a share of stock?

(350) What is meant by par value? What are the usual par values?

(351) Must all the capital stock of a corporation be subscribed for?

(352) Distinguish between unissued stock and treasury stock.

(353) What is the purpose of a certificate of stock?

(354) What is the liability of a subscriber to stock? of his transferee?

(355) May stock be paid for in property other than money? Suppose such property is overvalued, have creditors any rights?

(356) Define " watered stock."

PART VII

LAW OF PROPERTY

CHAPTER XLVI

GENERAL DESCRIPTION

Property defined. The political theory upon which all governments are now founded permits the acquisition of a thing or a right by an individual as his own to the exclusion of all others. That which is so exclusively controlled or "owned" we describe as his property. The law of property is the law by which it is determined what may be the subject of such ownership, the extent of the use to which the owner may put it, the manner by which he may acquire and part with it and the disposition thereof upon his death.

Real and personal property. Property is said to be "real property," or "realty" or "real estate" when it consists in land and that which is annexed thereto in permanent fashion for its improvement; and to be "personal property," or "personalty" or "personal estate" when it consists in other forms.

Example 150. A owns a tract of land consisting of 160 acres upon which he builds a residence and a barn and other houses. He fences the tract and plants trees and crops. He discovers that he has deposits of copper in the earth and erects a mining shaft. He furnishes

his house with usual furniture and household appliances, and he places on the house screens, which he removes in the winter time. He builds shelves in the pantry. He has horses and farming implements. Which of these are real and which personal property? The land is of course real estate; so is the residence and barn and other houses; so is the fence and the trees and crops. The copper in the earth is also real estate and so is the mining shaft. The furniture and household appliances are not for permanent improvement of the place and are personal property. The screens are a part of the house even though removable, and are real estate. The shelves in the pantry are for the permanent improvement of the house as a house and are real estate. The horses and farming implements are personal property.

Note in this example how one may change real into personal property and personal property into real. When the shelves in the pantry were in the form of standing trees they were real estate. A cuts down the trees and mills them into boards. The boards are now no longer a part of the land even though upon it, and are personal property. He puts them up as pantry shelves. They are now a part of the house. So with the mineral in the earth: when mined it becomes personal property.

The reader may naturally enough ask why this distinction is made if one form passes by act of the owner so readily into another form. Is it a mere academic distinction? No. Some very practical results hinge upon the distinction, as we may note by another example.

Example 151. A, in the example above, sells his tract of land to B, describing it by metes and bounds and making no specific reference to anything upon the land. All that which we have described as real property passes to B, including the pantry shelves and the screens, even though those screens are stored in the basement for the winter at the time of the sale. If there

> were a furnace in the house it would also pass as a part of the land, but a stove would not pass, as it is not generally considered as a permanent improvement of the house as such. The horses and implements and all that we have described as personal property would not pass to B.

We may perhaps safely describe the distinction in the following manner: all which is reasonably regarded as a part of the land or for its permanent improvement becomes real estate, but articles of a movable nature merely used upon it or to furnish it are personal property.

Besides the practical difference we have noticed in the sale of a farm, we notice others.

A sale of real property requires *formalities* not essential to a sale of personalty, and rightly so. Real property cannot be sold except by written instrument. Personal property passes readily from hand to hand as one observes every day. We noticed that a contract of sale of personal property for a certain amount or upwards requires a written memorandum, but that is only where possession does not pass, or price is not paid, and is a mere precaution against perjury. But title to real property requires a deed for its transfer.

A distinction is also made in disposition of real and personal property upon one's death. Real property goes to one's heirs, and personal property to one's administrator or executor for administration of the estate, as will be noted more fully hereafter.

That which is called real property by reason of its annexation to real estate, where it would except for that be called personal property, is called a " fixture."

When we are considering the right of the owner to remove a fixture as against some other person claiming

it, we must consider whether that other person is purchaser of the land, mortgagee of the land, or tenant of the land.

If the question arises between owner and purchaser, or between owner and mortgagee, everything that we have said above is the solution; but if a tenant puts in fixtures for household or trade or ornamental purposes he may remove them as against the landlord or those claiming under the landlord unless their removal would on account of the manner of their annexation cause material injury to the real estate to which they are attached. Thus a tenant may remove awnings, counters, shelving, and the like; anything attached by him, even though if attached by the owner it would be considered a part of the place, unless so firmly attached by the tenant that its removal would injure the place.

Of course an owner may tear down anything upon his place no matter how firmly annexed, if no one else has any interest in the place. What we have said is based upon the assumption of the intervention of another who claims something as against the owner.

Division of property into tangible and intangible property. That which a person owns under the law of property may be tangible or such as may be seen and felt and that which is intangible or rests in contemplation.

> **Example 152.** A owns a parcel of real estate with a house upon it, and furniture in the house. He also has a promissory note made by B. He has a right to sue C for breach of contract. A's house and furniture is tangible property. The note represents an intangible right against B. The right of action against C is intangible.

Questions and Problems

(357) What is meant by the word "property"?

(358) What two general kinds of property are there?

(359) In Example 150 state what property is "real," what "personal."

(360) Show how real property may be converted into personal property and personal property into real property.

(361) A sells his land, describing it in the deed as Lot 2 in Block 6 in John Smith's Subdivision in the Southwest Quarter of the Southwest Quarter of Sec. 8, Township 39 North, Range 14 East of the Third Principal Meridian in Cook County, Illinois. There is a house on the land with removable storm doors which are stored in the barn. There are also pictures on the walls; gas chandeliers suspended from the ceilings and usual household furniture. Also growing crops on the land, and a stack of hay. After the contract for the deed is signed, A starts to remove all of the articles mentioned. The purchaser objects. Who is entitled to the various articles mentioned? Why?

(362) A, owning a lot with a store building and house upon it, leases the property to B. B opens a dry goods store and moves his household goods into the house. In the store he puts a counter, fastening it to the floor with screws. He also puts shelving upon the walls. He puts a partition across the back of the store. In the house he also puts up shelving, installs a gas stove, a heating stove, with stove pipes into the chimney, and storm doors. Can he remove these things at the end of his term? Why?

(363) What is tangible property? intangible property? Give examples.

CHAPTER XLVII

ESTATES IN LAND

Estates defined. By estate which one has in land we mean the duration of his interest therein, whether absolute or limited, and if limited, to what extent.

Estates enumerated. Estates may be classified as follows:

A. Freehold estates.
  I. Estates in fee simple.
    (1) In general
    (2) Estates in remainder
    (3) Estates in reversion
    (4) Estates by executory devise
  II. Life estates.
    (1) Conventional life estates
    (2) Legal life estates
      (*a*) Dower
      (*b*) Curtesy
B. Estates less than freehold.
  I. Estates for years.
  II. Estates from year to year.
  III. Estates at will and sufferance.

Question

(864) Make a table of estates in land.

CHAPTER XLVIII

THE FREEHOLD ESTATES

THE ESTATE IN FEE SIMPLE

In general. An estate in fee simple exists where one owns real estate absolutely without limitation in time. That is to say, it belongs to him without any succession except such as he shall name or such as the law upon his death shall make if in his lifetime he does not himself dispose of it by deed or at his death by will. If in the instrument by which he gains title some one is to succeed him after a period of time or at his death, he does not have a fee simple. If he should try to sell it, the prospective purchaser would object that he did not own it absolutely, did not have a fee simple, but a life estate with reversion or remainder to some one else. In other words, ownership in fee simple is that ownership which one has when no restrictions are upon one's power of disposition and to which if no disposition is made, one's heirs, as named by law, succeed.

The term "fee" is a word coming to us as a relic of the feudal system, when "feuds" or fees were estates in land granted by a superior to his retainers in return for service or rent, which at first were held at the will of the lord or for life, but came to be inheritable.

A fee simple in the early law was created by a conveyance to a person and his heirs, without mentioning

what heirs " but leaving that to his own pleasure or the disposition of the law." If A conveyed to B, B got a life estate with reversion to A or A's heirs. But if A conveyed to " B and his heirs," B got a fee simple. The heirs got nothing except as they might inherit from B if B had not in his lifetime disposed of it. The rule was that the word " heirs " described B's estate and was not used for the purpose of giving the heirs anything in their own right. This rule was called the " rule in Shelley's case," that being one of the early cases in which it was first announced.

Fee simples are now created by will or deed to a person or to a person and his heirs. The necessity of the use of the word " heirs " has been abolished.

There was an important estate in fee known to the early law as the " estate in fee tail." It was an estate conveyed to one and a particular class of his heirs. This estate has been abolished by modern law.

Estate in remainder. The owner of a fee simple estate, in conveying it or devising it by will, may grant or give a limited estate to one person and the remainder to another. The first estate is known as the particular estate and the rest of the fee is known as the remainder.

> **Example 153.** A by will leaves his farm to his eldest son for life, and after that son's death then to his youngest son in fee. Here the eldest son has the particular estate and the youngest son the remainder.

A remainder is said to be *vested* when the remainderman is already entitled to it although his enjoyment thereof is postponed. In fact the particular estate may prevent his ever enjoying it, for it may outlast his life.

Thus in the above example the eldest son may outlive the youngest and yet the remainder is vested. The youngest son owns the farm subject to his brothers' life estate and may sell it subject to that estate. Because he clearly owns the remainder of the fee we say it has vested in him.

A remainder is said to be *contingent* when the vesting thereof is uncertain being based upon a condition that may never happen.

> **Example 154.** A by will gives land to B for life and then to B's eldest son in fee. If B has no son then to C and his heirs. In this case the remainder is uncertain until B has a son. Thereupon it vests and becomes a vested remainder. The law favors the vesting of estates as soon as possible.

Reversions. Where an estate which is less than the fee is granted out to a person, the remainder of the fee being undisposed of, that part of the fee after the expiration of the estate is known as the reversion. It is that which comes back to the grantor or his heirs.

> **Example 155.** A, owning Lot X in fee, leases it to B for a term of ninety-nine years. In this case A and his heirs are the owners of the reversion. A reversion differs from a remainder in this, that in the remainder, another than the grantor or his heirs is to take the fee, while a reversion comes back to the grantor or his heirs. And by that we mean it comes back to them unless the grantor has by deed or will disposed of his reversion to another.

Executory devises. It was a rule of the common law that an estate could not be created to take effect in the future unless supported by a particular estate. An exception was made to this in the case of an executory

devise, or a gift of real estate by will to take effect in the future upon the happening of a contingency.

Uses and trusts. The early common law permitted one to own land for another's benefit, or as it was said "to the use" of another. Thus A could own land to B's use. Here A had the legal title, but subject to B's rights as defined by the instrument of conveyance, which a court of equity would protect. Manifest abuses arose out of this device. It was employed to enable the church to be the real owner of land forbidden for it to own by the statute of mortmain. A could own the land to the use of the church. This gave A the legal ownership, but the church the beneficial use of the land. Other abuses arose, until it was declared by the Statute of Uses, that whenever land was held to another's use the legal title should at once by operation of law vest in the party having the use. The courts of equity in construing this statute decided that it did not apply to active uses, that is to say, to cases in which the holder of the legal title had active duties to perform, and such uses came to be known as *trusts*, which is the term we employ to-day to describe a very frequent condition of the title.

We may think of a trust as a device by which the title is longitudinally split up into two parts: one, the legal title in one person and the other the equitable title in another. Thus A by will gives land to B in trust for C, declaring in detail the objects of the trust. The purposes of creating trusts are manifold. A donor is thereby enabled to hold an estate together by the appointment of a trustee to hold the title in trust for the benefit of a number of persons; property is given

in trust where the beneficiary is not of sufficient ability to manage by reason of minority, spendthrift habits, or inexperience; a better control can be kept over the disposition of property where limited interests are desired to be given; and many other conveniences accomplished.

LIFE ESTATES

Conventional life estates. A conventional life estate is an estate for the tenant's own life or the life of another person, and which is created by will or deed rather than by operation of law. Thus, an estate for A's life, or an estate to A for B's life is a conventional life estate. By definition, it ceases at the death of the party named and the interest of the reversioner or remainderman will come to him for his enjoyment.

Legal life estates — dower and curtesy. The two most important estates created by law are those of dower and curtesy.

Dower is the life estate given by law to a surviving wife in real estate owned by her husband during the marriage and which by law at his death goes in fee to other heirs (subject to the wife's dower).

> **Example 156.** A, husband of B, buys real estate. This acquisition by operation of law at once gives B an inchoate dower interest, that is, a possibility of having dower therein based upon her outliving A. If this occurs, the law gives B a life estate in one third of this real estate for her life.

The possibility of a wife outliving her husband places a cloud upon his title, but this may be removed by her joining in the deed and acknowledging it according to law.

Dower is only a life interest, and at that in only one third of the deceased husband's real estate. Upon the wife's death, the heirs of the husband or any one to whom he may have sold it or willed it have it absolutely. Or by allowing the widow a sum of money her dower claim may be thus satisfied and the real estate thus cleared of her estate. If the wife *inherits* any of her husband's real estate she takes that absolutely, with dower in that which she does not inherit.

Example 157. A dies leaving no children or descendants. Under the law of his state his widow gets all his personal property, and one half his real estate, the other half going to his brothers and sisters. A has two vacant lots. One of these goes to A's widow as hers absolutely and the other goes to A's brothers and sisters subject to the widow's dower or one third interest for her life.

Curtesy was the estate of a surviving husband for his life in the wife's lands. In dower by early law it was not necessary that there be the birth of a child. But this was essential to curtesy. Curtesy was a life estate in *all* of the wife's lands.

Now by statute in many states curtesy has been abolished and a surviving husband given an estate similar to that of dower.

Questions and Problems

(365) Define an estate in fee simple. Where does the word "fee" come from?

(366) Is the word "heirs" necessary to the creation of a fee simple?

(367) A conveys to B for life and after B's death to C. After B and C both die A's heirs claim the estate as against C's heirs. Who is entitled to it?

(368) Define an estate in remainder. What two sorts are there? Give examples.

(369) Define an estate in reversion. Give an example.

(370) Define an executory devise.

(371) Define a trust, state its object and give an example.

(372) Define a conventional life estate.

(373) State Examples 156 and 157.

(374) Define curtesy.

CHAPTER XLIX

THE ESTATES LESS THAN FREEHOLD

The estates less than freehold defined. An estate less than freehold is one less than for life, that is, not measured by a life. It may be a tenancy for ninety-nine years, yet it is still less than freehold.

The law of landlord and tenant here involved. In considering estates for less than freehold we are considering the law of landlord and tenant, as we popularly understand those terms. Freehold estates have many incidents we have not time to notice, in which they differ materially from estates less than freehold which we are now to consider. A life estate is not usually granted by lease as these tenancies are, but by will or deed, and there is usually no rent to pay for the enjoyment and a right to have a wider enjoyment than a tenant under a lease.

Kinds of estates less than freehold. The tenancies less than freehold are estates for a specific period, called estates for years; periodic tenancies, called estates from year to year; and estates at will and at sufferance.

Estates from year to year or periodic tenancies. An estate may run by periods, that is, from month to month, from quarter to quarter, or from year to year. This kind of estate is called a periodic estate or estate from year to year. The significance of this estate is

that the estate may be terminated as of the end of the first or any subsequent period by either landlord or tenant by the giving of the required notice prior to the expiration of the period; and if that notice is not given then the tenancy runs for another like period or until such notice is given. A year to year tenancy by the common law requires a six months' notice for its termination, but this has been shortened by statute as, say, sixty days. A month to month tenancy usually requires a thirty-day notice. A tenancy terminating at a fixed period, as for one year, requires no notice to terminate it.

Periodic tenancies are created by contract or, as is more usually the case, by a lease for a certain period, as one year, and then a remaining in possession after the expiration of the lease, without the execution of any new one.

> **Example 158.** A rents a farm to B for one year under a written lease. When the year expires B continues to occupy. A may treat him as a trespasser and eject him or treat him as a tenant for another year upon the same terms as those of the previous year. B's intention in remaining in possession is immaterial. A must elect to regard him as a trespasser or as a tenant, and is bound by his election when made. He cannot change it. No notice was necessary to terminate the lease at the end of the first year, but after that it becomes a periodic tenancy and will continue to run from year to year until the proper notice is given by the one side or the other to terminate it.

Estates for years. An estate for years is an estate for any fixed period, as for five years, or for one year or for six months. It may resolve itself into a periodic tenancy, as we have shown, by a holding over. It needs no notice by landlord or tenant to terminate it.

The lease. Where in tenancies for years (that is, for any fixed period, as for one year) there is a written instrument setting forth the rights and duties of landlord and tenant, this instrument is called a *lease*, and it is always advisable to have a lease in any tenancy of importance. As we have already shown, where a tenant holds over after the expiration of the term prescribed in a written lease he may be treated as tenant for a like term under the same conditions.

Rent. The compensation paid by a tenant for the use of the premises is known as rent. It is a matter of contract between the parties as to amount and time payable.

Duties of landlord and tenant. The tenant must be sure that the premises suit his purposes before he rents them, as there is no implied warranty that they are fit for any particular purpose. He must return them to the landlord in the same condition, subject to reasonable wear and damage by the elements. The landlord, on his part, must be careful to disclose hidden defects of which he has knowledge, and where he retains a portion of the premises, as halls, and the like, which are used by the tenants, he must be careful to keep them in good condition.

Eviction by landlord. If the landlord ousts the tenant this is known as eviction. If the eviction is wrongful, the tenant can recover the possession or sue for damages. He is not liable for rent after eviction. Eviction is known as either actual or constructive. Actual eviction consists in an actual physical ouster of the tenant from all or a part of the premises. Constructive eviction consists of some conduct on the part of the landlord that

destroys the beneficial enjoyment by the tenant and justifies him leaving the premises, which in fact for such reason he actually does leave. In that case his obligation to pay rent ceases.

Questions and Problems

(375) What are the estates less than freehold?

(376) What is a periodic tenancy? What is its significance?

(377) What notice is required to terminate such a tenancy?

(378) What happens when a tenant holds over his term?

(379) Define an estate for years.

(380) What is a lease? State its purpose. Is it essential to tenancy?

(381) What are the duties of a tenant?

(382) A rents an apartment, the landlord retaining control of the heating apparatus and agreeing to furnish heat. No heat is furnished. Can A remain in possession and refuse to pay rent? Can he abandon the premises?

(383) What is actual eviction?

CHAPTER L

MORTGAGES

Definition of mortgage. A real estate mortgage is a conveyance of real estate in security for a debt.

> **Example 159.** A desires to borrow $5000 from B, but B requires security. To this end A conveys to B a certain parcel of real estate by a form of deed which recites the debt and provides for defeasance to A upon his payment of the debt.

History of law of mortgages. In early common law, where great attention was given to form, a mortgage was treated as a conveyance of the estate to the mortgagee upon a condition subsequent that if the mortgagor would perform the condition (*i.e.* in most cases pay a debt) his estate would revest, otherwise go to the mortgagee absolutely. This view was in accordance with the terms of the mortgage but was harsh in operation.

The equity of redemption. The courts of equity in course of time came to take a more equitable view of the situation. If a mortgagor filed a bill reciting the facts of his indebtedness and of the conveyance in security therefor, setting forth that the day of the payment of the debt (the " law day ") had passed and therefore by the strict rules of the common law he had lost his estate, and praying to be allowed by the court to pay the debt,

with accruing interests and costs, and thereby redeem his property, the court allowed him to do so, setting a time limit in which it must be done. His right to file such a bill came to be known as his "equity of redemption," and it is from this phrase that we get the word "equity" to-day. When we hear a person speaking of his equity in real estate, he means thereby that he owns the real estate subject to a mortgage; although, as we shall see, a mortgagor by the modern view owns the legal title rather than an equity.

The bill of foreclosure. As soon as the courts of equity gave this right to the mortgagor, they created a cloud upon the title of the mortgagee. For in case he desired to sell the property, claiming ownership therein by reason of the fact that the law day had passed with the condition unperformed the purchaser would fear that the mortgagor might file his bill for redemption. To meet this situation the mortgagee filed his bill reciting the fact of the mortgagor's default and his right to redeem, and asking that he be compelled to redeem within a time to be fixed by the court, otherwise to be "forever barred and foreclosed." This remedy the court would grant and the mortgagee's estate would thereupon become absolute unless redemption were made in accordance with the court's decree.

Modern view of a mortgage. It is seen that even under the equitable view of the right to redeem, the penalty was still harsh if the mortgagor could not pay the debt. The harshness has been eliminated by the courts under the modern view. A mortgage is now looked upon as in the nature of a lien in security for a debt. If the debt is not paid, then the property must

be sold and out of the proceeds the debt paid, and the balance, if any, turned over to the mortgagor as belonging to him. Under this view the mortgagor is the legal owner, who may convey the estate (subject to the mortgage) and whose heirs upon his death take title. He is entitled to possession and to the rents and profits. And if he makes default, the process of foreclosure is by sale either through the courts (as required in some states) or under a power of sale contained in the mortgage.

Statutory period of redemption. After a mortgage is foreclosed, there is a period of some months (varying in different states) in which the mortgagor may redeem from the sale by paying the debt and all costs and interest to date.

Mortgages in the form of trust deeds. A mortgage is frequently put in the form of a trust deed. Instead of being a deed from mortgagor to mortgagee it is a deed from the mortgagor to a trustee who is to hold the legal title in trust for the purposes of the security.

The evidence of the debt. The debt is expressed in a note or series of notes, referring to the mortgage or trust deed, which on its part describes the debt by describing the notes.

Questions and Problems

(384) Define a mortgage. Give an example.

(385) What was the ancient legal view of a mortgage?

(386) What is meant by the "equity of redemption"? Why is it so called?

(387) What is a bill of foreclosure?

(388) State the modern view of a mortgage.

(389) What is meant by the statutory period of redemption from sale under foreclosure?

(390) What is a trust deed in the nature of a mortgage?

CHAPTER LI

TRANSFER OF TITLE BY DEED

Deed of conveyance defined. Real estate is conveyed *inter vivos* by deed. The deed is the written instrument by which the transfer is set forth. It contains the names of the grantor and grantee, a description of the property, the conditions and covenants, and the consideration.

Kinds of deeds. The forms of deeds most in use today are the warranty deed, the quitclaim deed and the release deed.

The warranty deed is a deed whereby the grantor warrants his title. By statute in some states the use of certain words as " grant and convey " or " convey and warrant " will signify in themselves warranty of title. The warranty deed is the deed most used where land is conveyed in regular sale.

A quitclaim deed is a deed wherein the grantor quits his claim upon the land therein described. He makes no warranties as to his title, but the quitclaim deed is just as effectual to pass title as the warranty deed. But in the latter case, the grantor can be sued for defects that appear in the title.

A release deed is a deed used for the purpose of reconveying any interest which one has by reason of a former conveyance to him of some special title. Thus

if A mortgages his property in form of a trust deed to B, B upon payment of the debt will release to A all interest he has acquired by reason of such trust deed.

Attestation and acknowledgment. In some states a deed must be witnessed; in others, not. In all states a deed must be acknowledged for certain purposes, as waiver of homestead and dower, constituting constructive notice when recorded, etc. Forms of acknowledgment differ in various states. See the form of acknowledgment to the warranty deed above set out.

Questions and Problems

(391) What is the commonly accepted meaning of the word "deed"? State the kinds in common use.

(392) What is meant by the acknowledgment of a deed? What is its purpose?

CHAPTER LII

RULES OF DESCENT — WILLS

RULES OF DESCENT

General statement. When the owner of property dies, what shall be done with his property? Our immediate thought is that it should go to his relatives. But in what proportions? What relatives? Some decedents leave wives and children; some only brothers and sisters; some only parents. The law of descent and distribution is the law whereby the disposition of one's property at his death is determined.

If the owner of property is not satisfied with the rules of descent as established by law, the law permits him to direct in what manner it shall descend and be distributed by a declaration left by him at his death setting forth how he desires it to be done. This declaration is called his *will*. By this will he is enabled to govern the disposition of his property and even to give it to a stranger. Some restrictions are placed upon his right. A widow cannot entirely be deprived; and other restrictions may be imposed by local law.

We will notice the subject of Descent and Distribution and also the law of Wills in this chapter.

If one dies without a will he is spoken of as an "intestate." If he leaves a will, he is called a "testator."

The rules of descent. The early law established

certain rules of descent, or, as they were called, "canons of descent," some of the principles of which we still maintain, but which in their entirety have been greatly modified. One rule was that of primogeniture, or the right of the eldest son to inherit for the purpose of keeping the inheritance undivided. One of the most notable things done by the founders of our government was to abolish this rule. Another rule was that "the male issue shall be admitted before the female." Now, no distinction is made.

Another rule was that, "The lineal descendants *ad infinitum* of any person deceased shall represent their ancestor." This principle in the law of descent is still true.

It means that if a man dies leaving a son, and two grandchildren of a deceased son, in case no will directs otherwise, the two grandchildren will get the father's share.

The rules of descent as they now obtain differ in different states, and what is said here must be taken with that qualification in mind. Generally speaking we may say that property descends or is distributed as follows:

First assumption: *Decedent leaves widow and children:* All of his real estate goes to his children (a dower interest therein to the widow) and a fraction (as one third) of his personal property to his widow and the balance to his children.

Second assumption: *Decedent leaves children and no widow:* All of his estate goes to his children.

Third assumption: *Decedent leaves no widow and children:* His estate goes to his parents and his brothers and sisters.

Fourth assumption: *Decedent leaves widow and no children:* Personal estate goes to widow, but a portion of real estate goes to brothers and sisters.

WILLS

Will defined. A will may be defined as an instrument executed according to the requirements of the law by which a person directs the disposition of his property at his death. It is also called a testament. An addition to a will is called a codicil.

Will of no effect until death. A will has no effect until death. Hence it may be revoked or changed at any time before death. For this reason we frequently speak of a decedent's will as his last will, for any former wills made by him would be supplanted by the last will. In changing a will care must be taken to make the changes under the same formalities as those required in making a will; otherwise the changes will be nugatory and may impair the original will.

Formalities to be observed in making wills. Because a will is such an important document and comes into force and is proved after the death of its author, the law requires it to be executed with certain formalities.

Signature. A will must be signed by the testator. If he cannot sign his name he may make a mark as his signature.

Attestation. A will must be witnessed by more than one witness, generally two or three, as provided by local law. The witnessing must be in his presence, that is, where he can see the witness sign the document as witness thereto.

Revocation of wills. A will, being of no effect until death, may be revoked at any time. Revocation may be by tearing, burning, canceling, obliterating, with intent to revoke, or by a new will. It is also revoked by subsequent marriage; and in part revoked by subsequent birth of a child, unless this contingency is foreseen and provided for in the will.

PROBATE AND ADMINISTRATION

Court of probate jurisdiction. Certain courts, known as probate courts, county courts or surrogate courts, are given jurisdiction over the probate of wills and administration of estates, testate and intestate.

The personal representative. When one dies leaving an estate, it is essential that some person should be selected as his representative for the purpose of settling his affairs, that is, to collect the assets, pay the debts and distribute what remains to those entitled thereto under the law or according to the will.

If there is a will, a person may be named therein to perform this service. Such a person is called an *executor*. If there is no will, or if the will does not name a person, the court of probate will appoint one, and he is then known as an *administrator*. His duties are to collect the assets, pay debts, make an inventory, distribute assets to those entitled thereto and render a final report and account.

The personal representative takes a legal title to the personal property of the decedent in trust to use it for the settlement of the estate, but the real estate goes direct to the heirs according to the law of descent or to the devisees according to the provisions of the will. He has

nothing to do with the real property, unless the personal property is insufficient to pay debts, in which case he may subject the real property to the payment of such debts.

Questions and Problems

(393) What is meant by "descent" of property? Can an owner of property change the rules of descent as to his own property? How?

(394) Name some "canons of descent" that have been abolished.

(395) Name another canon of descent that is still true.

(396) State the four examples of descent given in the text.

(397) Define a will. When does it take effect?

(398) State the formalities in making a will.

(399) How may a will be revoked?

(400) Who is an executor? an administrator?

CONSTITUTION

OF THE

UNITED STATES OF AMERICA*

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one

* Reprinted from the text issued by the State Department.

Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections

for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if

not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no

Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one

who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: —

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and

Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

SECTION. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens

of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this

Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be

bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

THE AMENDMENTS.

I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

life or limb; nor shall be compelled in any Criminal Case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

XII.

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots

the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: *Provided* that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

XVIII.

SECTION 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all Territories subject to the jurisdiction thereof for beverage purposes are hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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